

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
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Inquiry Concerning Deployment of)	
Advanced Telecommunications)	
Capability to All Americans in a Reasonable)	
And Timely Fashion, and Possible Steps)	CC Docket No. 98-146
To Accelerate Such Deployment Pursuant)	
To Section 706 of the Telecommunications)	
Act of 1996)	

COMMENTS OF BELL SOUTH CORPORATION

BELL SOUTH CORPORATION

Stephen L. Earnest
Richard M. Sbaratta

Its Attorneys
Suite 4300
675 West Peachtree Street, N. E.
Atlanta, Georgia 30375-0001
(404) 335-0711

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COMMENTS OF BELL SOUTH CORPORATION

BellSouth Corporation, for itself and its wholly owned affiliated companies (collectively “BellSouth”), submits the following comments in response to the *Notice of Inquiry* (“*NOI*”) released in the above-captioned proceeding.¹

I. Introduction and Summary

Pursuant to Congress’ mandate, the Commission must evaluate the advanced services market and determine whether such services are being deployed to all Americans in a reasonable and timely manner. This *NOI* is the Commission’s third inquiry into the deployment of advanced services. In its first inquiry, the Commission determined that overall advanced services capability was being deployed reasonably and timely. In its comments and reply comments in the previous two proceedings, BellSouth presented significant analysis of the

¹ *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant To Section 706 of the Telecommunications Act of 1996*, CC Dkt. No. 98-146, *Notice of Inquiry*, FCC 01-223 (rel. Aug. 10, 2001) (“*NOI*”).

advanced services market demonstrating the different capabilities of providing advanced services and the numerous market participants. These capabilities continue to expand as new and innovative technologies are created and deployed. Indeed, the market is expanding rapidly.

For example, incumbent local exchange carriers (“ILECs”) have aggressively moved to deploy services that extend high-bandwidth capability to the home and business. Satellite operators currently offer nationwide high-speed Internet access. Cable companies (including AT&T) continue to upgrade their ubiquitous cable networks and are offering consumers high-speed cable modems. Competitive local exchange carriers (“CLECs”) continue to provide high-speed data services using their extensive fiber networks or by purchasing unbundled network elements from ILECs, which the Commission has made increasingly easier to do through Line Sharing² and Line Splitting,³ and installing their own digital subscriber line (“DSL”) equipment. Terrestrial wireless technologies also are being deployed to provide broadband capability in a number of spectrum bands such as 24 and 38 GHz. Other terrestrial wireless providers, including local multipoint distribution service (“LMDS”) providers, multipoint distribution service (“MDS”) providers and even digital television broadcasters, are fast becoming full-fledged providers of advanced services. For competitive assessment purposes, these many solutions for advanced telecommunications capability over the “final mile” form an advanced services market that is intensely competitive. Numerous providers have jumpstarted deployment

² *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, *Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98*, 14 FCC Rcd 20912 (1999) (“Line Sharing Order”).

³ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, *Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98*, 16 FCC Rcd 2101 (2001) (“Line Splitting Order”).

of advanced services to ensure that such services are reaching consumers in a reasonable and timely basis, however, regulatory inequities among competitors will only serve to impede competitive growth in the future.

BellSouth for example is a leader in deployment of ADSL. It currently has over ten million lines in the Southeast qualified to provide ADSL and became the first Bell Operating Company (“BOC”) to begin deploying ADSL over remote terminals (“RTs”). BellSouth plans to have over fifteen million lines capable of delivering service at the end of 2001 with a target customer rate of 600,000. These lines and customers included 46 markets in 2000 with the expectation of expanding to 63 markets by the end of 2001. These markets are not limited to urban areas. BellSouth ADSL deployment plans for 2001 include 517 central offices of which 75% are considered rural areas. Moreover, BellSouth continues to evaluate the use of wireless facilities to bridge the last mile to the customer.⁴ This type of technology may provide a quick and cost effective complementary means of providing advanced services, especially in rural areas.

While that is impressive growth, the Commission should not deduce that competitive inequities present in the current regulatory paradigm be allow full competitive growth to continue as it should. Although the role of the Internet in our daily lives and in business continues to evolve, one conclusion is indisputable, it will be significant. Also, without question is that the role of the Internet will be influenced by how broadband deployment takes place. Bill Gates, Chairman of Microsoft, recently remarked that “broadband deployment access [is] the

⁴ BellSouth conducted a trial in Houma, Louisiana in 2000 that tested a wireless system to deliver high-speed data. The wireless facilities provided high-speed downstream data transport and a wireline telephony facility was used for upstream transport. The results of the trial are proprietary. While BellSouth deemed the trial to be a success, questions remain about scalability and long-term competitiveness. Consequently, BellSouth is working with equipment vendors to increase functionality while decreasing costs.

weakest link of the Internet. Gates said development of a number of Internet companies and improved technology is being held back because the vast majority of consumers still use a dial-up service.”⁵ Although BellSouth believes that, thus far, broadband deployment has taken place in a reasonable and timely manner, it is clear that the faster this deployment can be completed, greater use of the Internet will be realized. The Commission’s obligation is to do everything in its power to ensure that deployment is not stifled by antiquated regulatory policies. Economic growth demands that regulations to be scaled back and that the free market be permitted to operate. To foster growth and broadband deployment, immediate corrective action is needed to eliminate the competitive disparities that exist because of uneven regulation and to create a level playing field for all competitors. Moreover, the Commission should remove regulatory uncertainty and conclude that unbundling of advanced services equipment is not necessary.

Finally, the Commission already obtains specific deployment information via its local competition and broadband reporting requirements proceeding.⁶ BellSouth fully complies with this reporting requirement and thus will not repeat that data in this filing.

II. Concerns Regarding the Commission’s Policy Positions Toward Advanced Services Capabilities

In the *NOI* the Commission asks a multitude of questions aimed at addressing Congress’ concern: “Whether advanced services capability is being deployed to all Americans in a reasonable and timely manner? If not, are there any actions that will accelerate such deployment?” As briefly summarized above, a wide range of competitors are deploying a

⁵ DeLong, Daniel F., *As Cable Modem Growth Rate Slows, Can Others Capitalize*, August 14, 2001, at <http://www.newsfactor.com/perl/story/?id=12779>.

⁶ *In the Matter of Local Competition and Broadband Reporting*, CC Docket No. 99-301, Notice of Proposed Rulemaking, 14 FCC Rcd 18100 (1999).

variety of technologies as fast as, or faster than, Congress could have envisioned in 1996. This deployment is occurring in backbone as well as last mile facilities. Moreover, while deployment is obviously taking place faster in more densely populated areas, the market is carrying advanced services capabilities to rural areas as well. Of course, competition among the various providers and full benefit to consumers could be occurring even faster and competition could be even greater among service providers if some competitors were not hobbled by more stringent regulatory burdens and obligations. Furthermore, the disincentives created by existing regulation and future regulatory uncertainty inhibits the deployment of new and innovative services that could be made available to consumers. With these issues in mind, BellSouth limits its specific comments to two areas of interest that the Commission should be mindful of its policy decisions regarding advanced services – the disparate regulatory treatment of advanced services providers and the regulatory uncertainty surrounding the advanced services marketplace, specifically the unbundling requirements of advanced services facilities.

A. Regulatory Parity

Although advanced services deployment is occurring on a timely basis, future deployment will best occur through equal competition among advanced service providers. Competition, however, requires that the Commission act neutrally and treat all competitors alike. The task facing the Commission is to remove the regulatory disparity that currently exists in the enhanced services market place. Accordingly, the Commission can take steps to further encourage competition and enhance deployment. Left unchecked, regulatory disparity will impede ILEC deployment of ADSL while cable providers are unencumbered by regulatory constraints in their deployment of cable modems. For example, BellSouth is a leading provider of DSL technology. With a long history of serving residential, rural and small business

customers, BellSouth and other ILECs are well-positioned to provide such advanced services to all of these segments. But providing widescale broadband capability is a considerable feat, even for an ILEC. It requires developing technologies, retrofitting loops or laying new networks, investing in costly new equipment and training service personnel. With these tasks accomplished, an ILEC is still handicapped in deploying advanced services by pricing, tariffing and other regulatory requirements, in addition to interLATA restrictions that bar the BOCs from providing advanced end-to-end networking services such as frame relay and ATM across LATA boundaries.

Because advanced services cross-conventional industry and regulatory lines, market participants currently face disparate levels of regulation, but for no rational reason. As the Commission has already acknowledged,⁷ no entrant dominates the advanced services market, thus no class of competitors should be subject to arduous regulation designed to protect against an abuse of market power. An ILEC's ownership of local exchange facilities awards it no competitive advantage in providing advanced services, particularly as its local exchange facilities are subject to mandatory unbundling and resale obligations. In fact, the cable industry, not the

⁷ See *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398 (1999) ("First Report"); *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, 15 FCC Rcd 20913, (2000) ("Second Report"); See also *In the Matter of Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 (1997) ("LMDS Order").

ILECs, enjoys the greatest share of the advanced access market,⁸ and long-distance carriers have a clear advantage in the advanced networking services market. Indeed, the *NOI* quoted current statistics to show that cable modems grew to 3.3 million lines by December 31, 2000 as compared to 1.6 million ADSL lines. Cable modem dominance will likely continue as it has in past years. Subjecting ILECs – or any broadband suppliers, for that matter – to cumbersome regulatory requirements for advanced services is unnecessary and only thwarts their full participation in the market, inhibits their incentive to develop innovative service offerings, encumbers their ability to respond to shifting market conditions, and ultimately delays widescale deployment and increases the cost of advanced services for consumers.

The economic similarities of ILECs and cable companies are significant. The services that ILECs and cable modem providers are marketing are both directed toward the mass market. Each has an existing customer base and an existing network. Both are new entrants into the advanced services market and therefore neither is dominant, even though cable modem providers have a clear lead on the number of customers. Both have made large investments in their networks and have considerable resources to devote to deployment.

With these striking similarities one would assume that these entities would be allowed to compete on a level regulatory playing field. Nothing could be further from the truth, however. The regulatory disparities are stark and overwhelming. ILECs are prohibited from providing advanced services across a LATA boundary; cable modem providers are not. Many ILEC services are subject to price regulation. ILECs must file tariffs with the Commission to establish the rates, terms and conditions under which they deal with their customers; cable modem providers do not. ILECs must, under certain circumstances, unbundle their network for

⁸ See *Precursor Group Newsletter*, February 22, 2001 (of existing residential households with broadband, 73% have cable modems and 26% have DSL).

competitors to use to provide advanced services;⁹ cable modem providers bear no such obligation. ILECs must allow competitors to collocate on their premises; again, cable modem providers bear no such obligation. ILECs must allow access to the loop facilities on a shared basis with their competitors; cable modem providers do not. Based on these regulatory realities, it should not come as a surprise that cable modem providers are leading in market share. Indeed, it is clear that regulation is favoring certain technology and providers over others and in the process leading to a potentially large inefficiency in the market's allocation of resources.

As part of Section 706 of the Telecommunications Act of 1996 ("1996 Act"), Congress required the Commission to undertake this comprehensive examination of the "availability of advanced telecommunications capability to all Americans." The Commission's mandate is explicit – if the deployment of advanced services is not progressing in a reasonable and timely fashion to all potential users, the Commission *must take immediate* action to accelerate deployment of advanced services by removing regulatory restraints that chill advanced services investment and inhibit competition. While BellSouth believes that deployment is taking place on a reasonable and timely basis, there are steps the Commission could take to accelerate the process more. The most powerful incentive for accelerating deployment of advanced telecommunications capability to all Americans is consumer demand. Competition in the advanced services marketplace needs no regulatory surrogate. Numerous participants are offering advanced services using innovative, competing technologies, and no supplier can

⁹ The Commission established certain circumstances when an ILEC must unbundle its packet switching network elements including the digital subscriber line access multiplexer ("DSLAM"). The test to determine when unbundling must occur is set forth in paragraph 313 of the *UNE Remand Order*. See *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

unilaterally exercise market power. The solution, therefore, is not to impose Title II regulation on cable operators or other broadband providers, but instead, to eliminate regulation of advanced services for all providers. With reasonably competitive conditions, “the market achieves economically efficient use of resources more quickly and more reliably than government regulation.” To stimulate innovation and investment in advanced services infrastructure, as Congress prescribed, the Commission must eliminate artificial constraints on some competitors. This act would permit the developing marketplace to select the technologies and service providers that best meet consumer demand.

There are many things that the Commission could do today, without legislation, to equal the disparity among advanced service providers. First, the Commission should recognize that ILEC property is private property. Accordingly, it should be conscientious about assuring just compensation for mandated uses, such as the provision of unbundled network elements (“UNEs”) to competitors. It should also assure recovery of costs incurred to accommodate competitors, *e.g.*, collocation. Second the Commission should recognize that broadband investment is new investment for both ILECs and CLECs. Therefore, it should not transfer CLEC business risks to ILECs through unbundling of advanced services equipment. Finally, the Commission should eliminate tariff/rate regulation of advanced services to be in parity with any conditions that are also applicable to cable companies. Implementation of these changes will go a long way toward equalizing competition in the advanced services market.¹⁰

B. The Commission Should Reach a Final Decision to Not Unbundle Advanced Services Equipment and Remove Regulatory Uncertainty Surrounding the Advanced Services Marketplace

¹⁰ See also, Comments filed by BellSouth and SBC in the *Cable Open Access* proceeding, GEN Docket No. 00-185, filed on December 1, 2000, attached as Exhibit 1.

One of the major impediments to broadband growth in the last mile is the uncertainty ILECs face regarding the possibility of having to unbundle its advanced services equipment, including packet switching. Although the Commission initially determined that such unbundling was unnecessary,¹¹ the Commission currently is reviewing this decision in other proceedings.¹² Such a ruling would cripple broadband deployment.

Deployment of network equipment necessary to provide advanced services is extremely costly. As with any investment, risk and reward determine the willingness of a carrier to commit capital resources to innovative network equipment. Requiring the carrier to open the investment, through unbundling, to others that incur no risk yet have the ability to achieve the rewards will have a stifling effect on any investment. If a carrier must unbundle its network investment in a nascent market to other carriers, it will simply choose not to invest because the limited rewards – limited because others can share in them – will not justify the investment.¹³

The Commission must therefore analyze the effects unbundling will have on investment and innovation in advanced services. There are important differences between the effects of unbundling elements used to provide traditional telecommunications services and the effects of unbundling new investment used to provide advanced services. The risk associated with high technology deployment is greater than that required to deliver traditional services. This

¹¹ See *UNE Remand Order*, 15 FCC Rcd at 3835-3840, ¶¶ 306-317.

¹² See *Line Splitting Order*. See also, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 15 FCC Rcd 17806 (2000).

¹³ See e.g., C. Michael Armstrong, *Telecom and Cable TV: Shared Prospects of the Communications Future*, delivered to the Washington Metropolitan Cable Club (Nov. 2, 1998) available at <<www.att.com/speeches/98/981102.maa.html. (“No company would invest billions of dollars...if competitors which have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride in the investments and risks of others.”)

technology is rapidly evolving and equipment can quickly become obsolete. Additionally, BellSouth faces stiff competition from cable TV competitors as well as competitive DSL providers. This competition for broadband customers prohibits raising prices for ADSL service, which delays the payback period on the investment and increases the risk.

As the Commission has acknowledged, “[I]nvestments in facilities used to provide service to nascent markets are inherently more risky than investments in well established markets. Customer demand for advanced services is also more difficult to predict accurately than is the demand for well established services.”¹⁴ An important part of the Commission’s reasoning to not unbundle advanced services equipment in the past, even though traditional services equipment had been unbundled, was to avoid stifling competition and to encourage innovation.¹⁵ This fact remains all the more relevant today.

Moreover, it would have a chilling effect on ILECs’ incentives to invest in the technologies upon which advanced services depend. Why would a competitive carrier that can share in the rewards of its competitor’s risk ever invest in the same equipment? Indeed, CLECs will not have any incentive to invest in equipment to provide advanced services if they can ride the backs of, and shift investment risks to, the ILECs. If unbundling is required, CLECs and ILECs will offer high-speed data services to exactly the same universe of customers, with the CLECs piggybacking off of the ILECs’ networks. CLECs and ILECs should be encouraged to build broadband networks where none exists today. Accordingly, the Commission must abandon any notion of unbundling advanced services equipment.

¹⁴ *UNE Remand Order*, 15 FCC Rcd at 3839, ¶ 314.

¹⁵ *Id.* at 3840, ¶ 316

The Commission has stabilized the traditional local services market by providing clarity to the elements that are subject to unbundling, e.g., traditional loops, sub-loops, and ports and other traditional local services. The Commission should likewise bring stability to the advanced services market by determining with equal clarity that investment in new technology involving DSLAMs and other equipment necessary to deliver high-speed and advanced services lines will not be unbundled. This will give all carriers the confidence to deploy new technology to make high-speed and advanced services available to more end-users. This confidence will stimulate investment and result in more Americans having access to high-speed and advanced services.

III. Conclusion

The Commission should work toward policies that will incent rapid growth in advanced telecommunications capabilities. Rapid growth is needed to fuel the growth of the Internet and its positive impact on the economy. Such policies will be best achieved by competition in the market and not past regulatory models. The Commission should be bold in letting fairly matched providers compete going forward on equal terms.

Respectfully submitted,

BELLSOUTH CORPORATION

By its Attorneys

/s/ Stephen L. Earnest

Stephen L. Earnest
Richard M. Sbaratta

Suite 4300
675 West Peachtree Street, N. E.
Atlanta, Georgia 30375
(404) 335-0711

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EXHIBIT 1

DEC 5

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COMMENTS OF SBC COMMUNICATIONS INC.
AND BELLSOUTH CORPORATION

Lori Fink
Paul K. Mancini
Roger K. Toppins
SBC COMMUNICATIONS INC.
1401 I Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 326-8895
Counsel for SBC Communications Inc.

Richard M. Sbaratta
Theodore R. Kingsley
BELLSOUTH CORPORATION
4300 BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375
(404) 249-2608
Counsel for BellSouth Corporation

Michael K. Kellogg
Antonia M. Apps
Colin S. Stretch
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
*Counsel for SBC Communications
Inc. and BellSouth Corporation*

December 1, 2000

EXECUTIVE SUMMARY

The regulatory treatment of broadband Internet access may well be the most important single issue facing the Commission today. Numerous regulatory proceedings coalesce around, and depend upon, the outcome of this inquiry. The Commission should take this opportunity to establish a clear and stable regulatory paradigm that will allow for maximum growth of, and maximum competition in, the market for broadband Internet access. Once that paradigm is established, the proper outcome of the various other regulatory proceedings – which for the most part are focused only on ILEC broadband services – will fall naturally into place.

This Commission has long recognized that competitive markets should be governed by market forces, not managed by regulation. Broadband Internet access is a brand new market, already characterized by many competitors, enormous capital investments, and explosive growth. Cable operators are undoubtedly dominant in this market today, but many other providers, using other technologies, are coming-on fast. As the Commission has already concluded, “the preconditions for monopoly appear absent.”

Allowing this new market to develop unimpeded, however, requires more than simply establishing a “hands-off” regulatory regime for cable. As the Commission, Congress, and the courts have emphasized time and again, like services must be treated alike, regardless of the name, corporate history, or traditional lines-of-business of the service provider. Broadband Internet access is the same service, whether it is provided over coax, over copper, or through the air. Yet, under the Commission’s current regulatory regime, telephone companies that provide this service are regulated to the hilt, while other service providers – the dominant cable operators in particular – are left alone.

The Commission must therefore use this proceeding not just to determine where cable fits on the regulatory map, but to establish a coherent regulatory policy that equalizes treatment for the full range of broadband service providers.

The most logical framework for such a policy is under Title I of the Act. The Commission has already concluded that Internet access – regardless of the transmission medium – is an “information service” subject to regulation under Title I. And as the Commission recognized three decades ago in the fledgling computer industry, regulation under Title I allows the Commission to leave competitive markets to competitive actors.

The Commission has suggested, however, that an information service provider that provides its own transmission facilities might be providing, in addition to an information service under Title I, a “telecommunications service” under Title II. If that is so, the service provider would be subject to regulation as a common carrier. But Commission precedent *requires* this two-hats/two-Titles approach *only* where a provider has market power – that is the only circumstance in which the Commission can justify the imposition of a legal obligation to serve indifferently. Otherwise, the decision is left to the service provider, who may – or may not – decide to provide transmission on a common carrier basis.

Thus, properly joined, the issue here is whether cable has sufficient broadband market power for the Commission to require it to operate as a common carrier. It is a close call, as cable operators serve close to 75 percent of the market, and their upgraded networks are far more ubiquitous than any competing networks. But the better answer – the one that fully accounts for the potential of competitive alternatives – is that cable is not a bottleneck in the market for broadband access. Cable operators should therefore be

given the *option* – as in fact many other service providers have been given the option, in many different contexts – whether to provide a separate broadband transmission path subject to Title II, or whether instead to package their services exclusively under Title I.

If cable operators – the dominant providers of high-speed Internet access – are to be given this option, however, it necessarily follows that incumbent telephone companies – the nondominant latecomers to this market – must be given the same option. To date, the Commission has simply assumed that incumbent LECs that provide high-speed Internet access in competition with cable *must* offer the underlying transmission path on a common carrier basis. That assumption is unfounded. Incumbent LECs should stand on equal footing with other service providers, equally free to package their services under Title I or Title II as they see fit.

Once it is clear that incumbent LECs cannot be compelled to provide broadband on a common carrier basis, it follows that the enormous regulatory scaffold that the Commission has built up around incumbent LEC xDSL offerings must be dismantled. Unbundled access to the high frequency portion of the loop, loop conditioning, loop qualification, related collocation mandates, the restriction on providing in-region interLATA information services, mandatory resale discounts, separate affiliate conditions – all of these requirements (and more) are premised on the counter-factual premise that ILECs control a broadband bottleneck. None can stand once ILECs are no longer required to offer broadband transmission on a common carrier basis.

If the Commission is unwilling to embrace a fully competitive broadband framework, it has available to it an intermediate Title I approach, modeled loosely on the *Computer Inquiries*' comparably efficient interconnection and open network architecture

requirements. Some such requirements – though self-evidently inapplicable where, as here, the telephone network is not a bottleneck – could be resurrected under Title I as a means to facilitate the development of independent ISPs that do not provide their own transmission. If the Commission opts for this intermediate course, however, it must apply it across-the-board. There is no basis for imposing regulation on the nondominant telephone companies that is more intrusive than that felt by the dominant cable operators.

If the Commission is unwilling to regulate *all* broadband Internet service providers under Title I only, the only logical alternative is to regulate all of them, cable included, under Title II. That is to say, if the xDSL-enabled transmission path that underlies the ILECs' broadband Internet service is a "telecommunications service" subject to Title II, then so too is the cable modem platform that underlies cable Internet service. That cable operators currently elect to bundle their information service with the transmission cannot be dispositive – no more (or less) so than such an election is dispositive if made by a telephone company. As the Ninth Circuit recently confirmed, cable operators and telephone companies are equally capable of wearing two regulatory hats simultaneously.

Under a Title II framework, moreover, the Commission must impose on the dominant cable incumbents the same regulatory scaffold that has been imposed on telephone companies, including spectrum unbundling, collocation requirements, performance metrics, and the like. The Commission's Title II authority to do so is indisputable. The Commission has already noted its authority to impose Internet-related interconnection requirements upon all Title II carriers pursuant to sections 201 and 251(a). And Commission precedent establishes that incumbent cable operators – which

must be considered local exchange carriers in the provision of Internet access to the same extent as telephone companies – are comparable to ILECs and therefore directly subject to section 251(c).

As under a Title I framework, there is an intermediate approach under Title II as well. The Commission can declare cable operators as nondominant carriers subject to its permissive detariffing policy, thereby subjecting cable Internet services to reduced common carrier regulation. Of course, if cable broadband providers are classified as nondominant because they do not control bottleneck facilities, ILECs, with perhaps one-quarter of the market, must be nondominant too.

The Commission can also, within a Title II framework, remove many of the current restrictions on ILEC provision of broadband Internet access. It can (and should), for example, de-UNE-fy the high frequency portion of the loop, and in the process eliminate loop conditioning, loop qualification, and related collocation mandates, as well as separate affiliate conditions imposed through the merger process. In that case – but only in that case – such restrictions would not need to be extended to cable modem providers. The key principle driving all such Commission decisions must be regulatory parity in order to preserve the competitive structure of the market.

The final alternative classification for broadband Internet service – as a “cable service” subject to Title VI – is no alternative at all. The statute restricts the term “cable service” to information that a cable operator makes available to all subscribers generally. A substantial portion of Internet content – email and chat rooms, for example – is decidedly *not* available to all subscribers generally, and thus does not meet the statutory definition.

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In its *Notice of Inquiry*, the Commission has asked numerous questions about how it should regulate cable Internet service. These questions cannot be answered in isolation. Cable Internet service competes directly with DSL service provided by incumbent LECs and with other nascent broadband services provided by satellite and wireless. Together, these services constitute a single new, highly competitive market that demands uniform regulatory treatment. In this proceeding, the Commission has the opportunity, and the obligation, to develop a new regulatory paradigm that will treat all providers equally and, hence, foster innovation and investment in this rapidly emerging and economically critical market.

Today, cable is indisputably the dominant broadband Internet access provider, with almost three-fourths of the market. Its next closest competitor, DSL, has perhaps one quarter of the market. But the market is young, and growing extraordinarily fast. Huge investments are now being made to upgrade cable plant on the one hand, and telephone plant on the other. Wireless alternatives, both terrestrial and satellite-based,

are emerging rapidly as well. The Commission has correctly concluded that the “preconditions for monopoly appear absent.”¹

By all logic, then, market forces, not regulation, should rule from here on out. So far, the Commission appears to have accepted that conclusion in connection with cable’s provision of high-speed services. But the telephone side of this market – the latecomer to the arena, and the nondominant provider – is regulated to the hilt. This upside-down state of regulatory affairs is untenable. It squarely conflicts with decades of Commission precedent establishing that regulation must be tied to the service, not to the underlying technology used to provide it, still less to arbitrary and wholly obsolescent naming conventions, like “cable” and “telephone.” And it is tilting investment toward one technology and away from another, something that the Commission itself has frequently insisted it should not be doing. “The role of the Commission is not to pick winners or losers, or select the ‘best’ technology to meet consumer demand, but rather to ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers.”²

The Commission should thus have the courage to establish a market-based framework for *all* high-speed Internet service providers, and to apply that framework across the board. That means placing all of them – *in their entirety*, including *all* underlying broadband transport components – under Title I of the Communications Act.

¹ Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 FCC Rcd 2398, 2423-24, ¶ 48 (1999) (“*First Advanced Services Report*”).

² *Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd 24011, 24014-15, ¶¶ 2, 3 & n.6 (1998); see also, e.g., First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15989, ¶ 993 (1996) (“*Local Competition Order*”) (“[A]s a general policy matter, . . . all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise.”).

It also means rolling back burdensome regulation that has been imposed on incumbent LECs providing DSL; and forestalling premature regulation of the new technologies incumbent LECs are rolling out to serve this evolving market.³

The only economically rational and lawful alternative to a Title I framework is to place the underlying broadband transport components *for all services* – both cable and telephone – under Title II of the Communications Act. The Commission would then need to apply the full panoply of unbundling, interconnection, collocation and separate affiliate obligations even-handedly to both. Or, to the extent that the Commission forbears from applying any of those requirements or restrictions on cable modem service, it must remove them from DSL service as well.

The third alternative mentioned by the Commission in its *Notice of Inquiry* – placing all high-speed Internet service under Title VI – is no alternative at all. The statute and its legislative history unambiguously foreclose that result.

BACKGROUND

As the Commission has already correctly concluded, broadband Internet service occupies a separate market.⁴ The service is different from both traditional phone and

³ For this reason, the Commission should avoid any precipitous action in pending proceedings on line sharing, access to remote terminals, and the like, where parties are advocating increased regulation of wireline broadband Internet access services. It is incumbent upon the Commission, first, to establish a coherent, forward-looking regulatory framework that governs all broadband Internet services, rather than to continue to engage in piece-meal regulation of particular technologies.

⁴ E.g., FCC Staff Report, *Broadband Today*, at 42 (Oct. 1999) (“*Broadband Today*”) (arguing that cable’s dominance over broadband will be tempered not by dial-up services but rather by “alternative platforms to use for high-speed data access”); Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, 15 FCC Rcd 11857, 11864-65, ¶ 18 (2000) (“*Fixed Wireless Competition Order*”) (discussing competition in the broadband market).

traditional cable video services – it is two-way, high-speed, and digital.⁵ Consumers use the new service to do things that they could not do at all over narrowband connections.⁶ They pay substantially more for that privilege.⁷ The pricing of the new services is not disciplined by the pricing of the old.⁸ The technological infrastructure is altogether new as well, and very expensive to boot.⁹ Both telephone companies and cable companies must invest comparable amounts to make it possible to provide broadband services – they are, in effect, building new networks in a race to serve these customers.¹⁰

The battle lines in this new market are clearly drawn. On one side stand the incumbent cable operators, on the other the incumbent telephone companies. Neither is dependent in any way on the other's wires. And both face a threat from new technologies

⁵ See *First Advanced Services Report*, 14 FCC Rcd at 2406, ¶ 20 (defining "broadband" as the capability of supporting in both directions a speed in excess of 200kbps in the last mile); see also *id.* at 2407, ¶ 23 ("[W]hether a capability is broadband does not depend on the use of any particular technology or the nature of the provider.").

⁶ See, e.g., *Broadband Today* at 9; see also *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (whether two products compete depends on whether their "price, use and qualities" render them interchangeable).

⁷ Broadband service typically costs approximately \$40 per month. See, e.g., *Fixed Wireless Competition Order*, 15 FCC Rcd at 11865-66, ¶ 20. By contrast, dial-up connections are often free. See, e.g., <http://dl.www.juno.com/get/web/>; <http://www.netzero.com/>; <http://www.altavista.com/>; <http://freeisp.nbc.com/>; <http://freelane.excite.com/>.

⁸ See, e.g., Declaration of Jerry A. Hausman ¶ 10, Comments of America Online, Inc., *Joint Applications of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and Its Affiliates or Subsidiaries*, CS Docket No. 98-178 (FCC filed Oct. 29, 1998) ("[The] price of narrowband Internet service does not affect the demand for broadband Internet service.").

⁹ Cost estimates for establishing high-speed service range from \$500 to \$1,200 per subscriber. See Sanford C. Bernstein & Co. and McKinsey & Co., Inc., *Broadband!*, at 77-78 (Jan. 2000) ("*McKinsey Broadband Report*") (estimating upgrade costs per subscriber at \$545 for cable, \$908 for DSL and \$610 for MMDS); J. Creswell, *The Shaky Assumptions Boosting Cable Prices*, *Fortune* (July 5, 1999) (noting that cable operators face "upgrades of titanic proportions and huge amounts of capital expenditures," including "high-speed data upgrades" at \$700 to \$1,200 per customer); see also *Fixed Wireless Competition Order*, 15 FCC Rcd at 11868, ¶ 24 ("LMDS equipment . . . is expensive, and requires large infusions of capital.").

¹⁰ See, e.g., FCC Press Release, *FCC Issues Report on the Availability of High-Speed and Advanced Telecommunications Services* (Aug. 3, 2000) (estimating broadband annual growth rate at between 150 and 350 percent).

– fixed wireless in particular, and satellite – that are already available commercially and that completely bypass the traditional wireline networks.¹¹

Cable is unquestionably winning the broadband battle so far. Cable operators got to market first, and they have signed-up close to three out of every four residential broadband subscribers. *See* Attach. A.¹² Together, the two largest cable modem providers – AT&T's Excite@Home and Time Warner's Road Runner – have far more residential subscribers than all DSL providers combined. *See id.* The Commission expects cable companies to reach 61 million households by the end of this year, a better than 60 percent advantage over DSL.¹³ Analysts are generally of the view that DSL will not be on a competitive par with cable in this market for four years or more.¹⁴ And the other emerging technologies, though fully expected to compete significantly in this market, have yet to make substantial inroads on cable's dominance. *See* Attach. A.

¹¹ *See, e.g., Broadband Today* at 21-22; *Fixed Wireless Competition Order*, 15 FCC Rcd at 11865, ¶ 19 (identifying "a continuing increase in consumer broadband choices within and among the various delivery alternatives – xDSL, cable modems, satellite, fixed wireless, and mobile wireless").

¹² *See also, e.g., Second Report, Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket No. 98-146, FCC 00-290, ¶¶ 71, 72 (rel. Aug. 21, 2000) ("Second Advanced Services Report") (as of December 31, 1999, cable had 87.5% of all residential "advanced services" subscribers and 78% of all residential "high-speed" subscribers).

¹³ *See Broadband Today* at 26; *see also McKinsey Broadband Report* at 30-31 & Exhs. 22, 26 (forecasting that cable will reach 63,680,000 households, and DSL 38,560,000, by year end 2000); *compare* Bear Stearns Equity Research, *Byte Fight!*, at 36 (Apr. 2000) ("Bear Stearns Report") (By year-end 2000, all major cable operators "will have at least 70% of their plant at 750 MHz or above," and most will be "largely completed with their upgrades by the middle of 2002") with *Fixed Wireless Competition Order*, 15 FCC Rcd at 11870, ¶ 29 ("Forty to fifty percent of local lines in the National Exchange Carrier Association pools exceed three miles, at or beyond DSL's practical limit of 3.4 miles . . .").

¹⁴ *See Broadband Today* at 27 & App. B, Chart 2 (predicting that cable will continue to lead DSL until at least 2007); *Bear Stearns Report* at 57, Exh. 15 (predicting 12.7 million cable modem customers in 2004 compared to 9.5 million DSL customers); *McKinsey Broadband Report* at 44, Exh. 20 ("[w]e expect that cable's initial lead and higher installed base combined with its closer and more natural tie to television will likely mean the persistence of the cable market-share lead over DSL into the 2004 time frame").

Despite cable's dominance, the Commission has apparently concluded – reasonably, in our view – that there is enough “actual and potential competition” in the broadband market today to leave its development to market forces.¹⁵ Accordingly, the Commission has signaled its commitment not to take sides in this battle, and to allow market actors to recoup the fruits of their investment. As Chairman Kennard explained:

“[T]he FCC has taken a hands-off, deregulatory approach to the broadband market. . . . There is no sign that consumers do not have other avenues to get broadband connections if they don't want to use cable. . . . So we decided to let the market forces churn while we carefully monitor the situation, and the marketplace has responded with enormous investment in broadband – and not just in cable.”¹⁶

Despite this clear statement – upon which the industry has relied in making huge investments to upgrade their facilities – the Commission's approach has turned out to be anything but “hands-off” and “deregulatory.” Rather than leaving this race to the fit, the Commission has shackled the incumbent telephone companies – the nondominant player, with perhaps a quarter of the market – with burdensome, highly restrictive regulation that is not felt by the dominant cable incumbents.¹⁷ Telephone companies have to “unbundle” the wireline spectrum that they use for broadband, for example, and make it available to all comers at regulated prices. Cable companies do not. Telephone companies must permit their competitors to “collocate” equipment in telephone company premises to

¹⁵ Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, 15 FCC Rcd 9816, 9862, ¶ 116 (2000) (“*AT&T/MediaOne Order*”); see also *Fixed Wireless Competition Order*, 15 FCC Rcd at 11864, ¶ 18 (“An increasing number of broadband firms and technologies are providing growing competition to incumbent LECs and incumbent cable companies, apparently limiting the threat that they will be able to preclude competition in the provision of broadband services.”).

¹⁶ Chairman William E. Kennard, Remarks Before the Federal Communications Bar Northern California Chapter, *The Unregulation of the Internet: Laying a Competitive Course for the Future* (July 20, 1999); see also *First Advanced Services Report*, 14 FCC Rcd at 2402, ¶ 5 (in advanced services, “[w]e intend to rely as much as possible on free markets and private enterprise”).

¹⁷ See generally *infra* pp. 19-23, 32-38.

make it easier to use that “unbundled” spectrum. Cable companies do not. Telephone companies are almost completely locked-out of the multi-billion dollar (and rapidly expanding) Internet backbone service. Cable companies are not. Telephone companies must offer their retail broadband transmission services to competitors at a federally mandated discount. Cable companies do not. Telephone companies have to pay-in to universal service when they provide broadband access. Cable companies do not. And telephone companies have been forced to carve-out their broadband transmission services into a separate affiliate as a condition to gaining regulatory approval of recent mergers. Cable companies have not.

As a policy matter, this regulatory disparity is unjustifiable. Each of the regulatory restrictions placed on the telephone companies is grounded in the premise that telephone companies control a bottleneck in the market for broadband access. They do not. If there is any bottleneck control to be considered in this new market, it belongs to the dominant cable operators. Asymmetric treatment is unfair, and it puts at risk the industry’s commitment to go forward with the huge capital investments necessary to bring broadband services to the general public.

As a legal matter, the disparity is equally untenable. As we explain in detail below, Commission precedent, congressional directive, and judicial mandate all stand squarely for the proposition that like services must be treated alike. The Commission must therefore establish a regulatory framework that takes account of the full range of broadband service providers, not just cable operators. Because the services in question are competitive, the appropriate treatment is market-based. But if the Commission lacks the inclination to establish such a framework, the inescapable alternative is that

incumbent cable operators must be subject to the same regulatory framework that now burdens the incumbent telephone companies.

DISCUSSION

I. REGULATORY CATEGORIZATIONS MUST TRACK THE NATURE OF THE SERVICE, NOT THE UNDERLYING TECHNOLOGY OR THE HISTORICAL LINES OF BUSINESS OF THE SERVICE PROVIDER.

It is the nature of a service, not the name, history, or character of the entity providing it, that determines which Title of the Communications Act applies. That principle has been consistently affirmed by Congress, the Commission, and the courts, for over four decades.

The Communications Act states unambiguously that Title III broadcasters are not common carriers.¹⁸ Yet a Title III “broadcaster” ceases to “engage in broadcasting” – it becomes a Title II “carrier” instead – when it offers carriage over the “blanking interval” or “subcarrier” portions of its assigned frequency bands, or when it makes comparable use of the digital spectrum allocated to it pursuant to the 1996 Act.¹⁹ Cable systems likewise cannot be regulated under Title II “by reason of providing any *cable service*.”²⁰ But they *do* fall under Title II as soon as they provide a *telecommunications service*.²¹

¹⁸ See 47 U.S.C. § 153(h) (“a person engaged in radio broadcasting shall not . . . be deemed a common carrier”).

¹⁹ See Report and Order, *Digital Data Transmission Report and Order*, 11 FCC Rcd 7799, 7805, ¶ 16 (1996) (“consistent with the current VBI telecommunications service rules, ancillary services that are common carrier in nature and provided over broadcast signals will be subject to common carrier regulation”); 47 C.F.R. § 73.295(b) (“FM subsidiary communications services that are common carrier in nature are subject to common carrier regulation.”); Fifth Report and Order, *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, 12820-21, ¶ 29, 12823, ¶ 36 (1997) (“ancillary and supplementary services” provided over digital spectrum allocated pursuant to 47 U.S.C. § 336 will be regulated “in a manner consistent with analogous services provided by other persons or entities”).

²⁰ See 47 U.S.C. § 541(e) (emphasis added).

²¹ *Id.* § 541(b) (exempting cable systems from cable franchise requirements when providing telecommunications services); *id.* § 541(d)(1) (FCC and states may require cable systems to tariff services

Telephone companies have traditionally provided carriage under Title II, but they are Title VI cable operators insofar as they use their facilities (copper, coax, or any other) to provide a “cable service” instead.²² The same holds for DBS and MDS licensees: whether their services fall under Title II or Title III depends on the nature of the services, not on the technology used to supply them.²³

When in the past the Commission has lost sight of this core principle – that the nature of the service defines its regulatory treatment – the courts or Congress have intervened. Reasoning that anything offered by a service provider primarily in the business of common carriage *is* “common carriage,” the Commission at one time attempted to regulate a dark fiber service as common carriage, even though the service had been offered only on a private-contract basis. The D.C. Circuit overturned that decision, noting that “[w]hether an entity in a given case is to be considered a common carrier” turns not on its usual status but “on the *particular practice* under surveillance.”²⁴

that would be subject to regulation “if offered by a common carrier subject . . . to [Title II]”); *see also* H.R. Rep. No. 98-934, at 43 (1984 Cable Act) (“[The] distinction between cable services and other services offered over cable systems is based upon the nature of the service provided, not upon a technological evaluation of the two-way transmission capabilities of cable systems.”).

²² 47 U.S.C. §§ 522(a)(7), 571(a)(3).

²³ *See* Report and Order, *Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference*, 90 F.C.C.2d 676, 706-09, ¶¶ 78-84 (1982) (“DBS Order”), *aff’d in relevant part*, *National Ass’n of Broadcasters v. FCC*, 740 F.2d 1190, 1199-1206 (D.C. Cir. 1984); *see also* Letter from Barbara A. Kreisman, Chief, Video Services Division, Mass Media Bureau, FCC, to Marvin Rosenberg, Esq., Fletcher, Heald & Hildreth (Jan. 15, 1993) (“Kreisman Letter”) (summarizing DBS regulatory framework); Report and Order, *Revisions to Part 21 of the Commission’s Rules Regarding Multipoint Distribution Service*, 2 FCC Rcd 4251, 4251-53, ¶¶ 1-16 (1987) (“MDS Report and Order”) (authorizing MDS operators to choose common carrier or non-common carrier status for individual channels); *National Ass’n for Better Broad. v. FCC*, 849 F.2d 655 (D.C. Cir. 1988) (upholding FCC exemption of DBS from Title III obligations through analogy to MDS regulation); *see also* Report and Order, *Subscription Video*, 2 FCC Rcd 1001, 1005, ¶ 32 (1987) (differentiating broadcast from subscription-based service).

²⁴ *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (emphasis added); *see also* *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) (*NARUC I*) (“[a] particular system is a common carrier by virtue of its functions”); *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (*NARUC II*) (“Since it is clearly possible for a given

When the Commission declined to place NEXTEL's "private" wireless service on the same regulatory footing as functionally equivalent "public" service, Congress enacted legislation to ensure that "services that provide equivalent mobile services are regulated in the same manner."²⁵ And when the Commission still sought to regulate PCS differently from cellular, the Sixth Circuit overruled it.²⁶

As the Commission itself has repeatedly declared, the 1996 Act is "technologically neutral and is designed to ensure competition in all telecommunications markets."²⁷ By eliminating regulatory distinctions between incumbent LECs, cable operators, and others, the 1996 Act allows these providers not only to challenge one another in their traditional strongholds, but also to compete on equal terms in the creation and development of new markets, whatever technology they might use.²⁸

entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others.").

²⁵ H.R. Rep. No. 103-111, at 259-60 (1993) (discussing Pub. L. No. 103-66, tit. VI, § 6001(a), 107 Stat. 312 (1993)); *see also id.* (though "'private' carriers have become indistinguishable from common carriers," they were "subject to [an] inconsistent regulatory scheme[]"; because the "disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services," the Commission was directed to "achieve regulatory parity among services that are substantially similar") (footnote omitted).

²⁶ *See Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995) ("If [PCS] and Cellular . . . are expected to compete for customers on price, quality, and services, . . . what difference between the two services justifies keeping the structural separation rule intact for Bell Cellular providers? The FCC provides no answer to this question, other than its raw assertion that the two industries are different."); *see also GTE Midwest, Inc. v. FCC*, No. 98-3167, 2000 WL 1701414, at *1-*2 (6th Cir. Nov. 15, 2000) (affirming Commission decision on remand from *Cincinnati Bell* to impose separate affiliate requirements on *all* local telephone companies providing *any* kind of commercial mobile radio service).

²⁷ *See Order on Remand, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, 386, ¶ 2 (1999) ("Advanced Services Order on Remand"); *Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24017, ¶ 11; *see also Report to Congress, Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11548, ¶ 98 (1998) ("Report to Congress") ("We are mindful that, in order to promote equity and efficiency, we should avoid creating regulatory distinctions based purely on technology."); *see generally* B. Esbin, Office of Plans and Policy, FCC, *Internet Over Cable: Defining the Future in Terms of the Past*, at 96 (OPP Working Paper No. 30, Aug. 1998) (noting the "fundamental communications policy goal[]" of "competitive and technological neutrality").

²⁸ *See, e.g., Sixth Annual Report, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 FCC Rcd 978, 982, ¶ 10 (2000) ("Sixth Video Competition Report") (the 1996 Act "removed barriers to LEC entry into the video marketplace in order to facilitate competition

The Commission itself, however, has wholly failed to respect that principle in connection with broadband Internet services. The Commission has justified its departure on the ground that the 1996 Act “explicitly makes distinctions based on a common carrier’s prior monopoly status.”²⁹ But the incumbent phone companies that are directly burdened by that conclusion have no “prior monopoly” in the market for broadband Internet services – there is no “prior” market here at all; the market is brand new.

Equally important, this new market is not dependent on any one technology or set of facilities under the control of the incumbent phone companies. In that respect, the market is fundamentally different from prior new markets, such as information services and even cellular, which remained heavily dependent upon the public switched telephone network. As those markets emerged, the Commission sought simultaneously to deregulate new entrants, while retaining restrictions on the participation of local telephone companies to prevent any abuse of bottleneck control over local exchange facilities. For broadband Internet services, there is no bottleneck. Coax, not copper, is the dominant technology. And wireless and satellite alternatives are developing fast. Many billions of dollars are now being invested in an array of facilities used to provide these services. To microscopically regulate one portion of that investment, but not the others, cannot be reconciled with the language or intent of the 1996 Act. Still less can it be justified as rational economic policy.

between incumbent cable operators and telephone companies”); *Fixed Wireless Competition Order*, 15 FCC Rcd at 11861, ¶ 8 (noting “the 1996 Act’s mandate to stimulate competition in telecommunications markets with a minimum of regulatory interference”).

²⁹ Third Report and Order and Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912, 20941, ¶ 59 (1999) (“*Line Sharing Order*”).

If there is any “prior monopoly” to consider here at all, it is the cable operators’ – they are the ones who began with a dominant position in the antecedent “broadband” market, the market for multi-channel video distribution.³⁰ The better view, however – indeed, the only view consistent with sound policy and the 1996 Act – is that broadband Internet service constitutes brand new territory to which every provider should be able to stake a claim using its own blend of technology, without any prior regulatory baggage based on the services that it has historically provided in a wholly different market.

II. THREE REGULATORY MODELS FOR BROADBAND.

All providers of high-speed Internet services should be regulated under Title I – and under Title I alone. To get to that point, the FCC must dismantle the sprawling scaffold of regulation that it has erected around ILEC DSL services.

The only principled alternative – the only alternative that is defensible on economic grounds, and that will survive review in the courts – is to treat the underlying broadband data transmission as a Title II service, and to subject all such providers to identical Title II regulation (either the full panoply of regulations currently applicable to the DSL offerings of incumbent telephone companies, or a significantly reduced set of regulations appropriate to nondominant carriers in a competitive market).

³⁰ See 47 U.S.C. § 522(13) (“the term ‘multichannel video programming distributor’ means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase . . . multiple channels of video programming”); *Sixth Video Competition Report*, 15 FCC Rcd at 981, ¶ 5 (“as of June 1999, 82% of all MVPD subscribers received their video programming from a local franchised cable operator”); *id.* at 982, ¶ 11 (“Cable operators continue to expand their broadband infrastructure that permits them to offer high-speed Internet access.”).

A third regulatory option suggested by the Commission – classifying *all* high-speed Internet services as Title VI “cable services” – is no option at all. The statute and its legislative history unambiguously foreclose that result.

A. TITLE I SHOULD GOVERN HIGH-SPEED INTERNET SERVICES.

Where, as here, a market is competitive, “[t]he Commission’s charge is to . . . avoid direct intervention.”³¹ Regulation impedes competition and slows growth and innovation.³² It is especially important to allow market forces, rather than regulatory fiat, to determine how best to allocate resources in nascent markets, where competitors are making large investments and deploying innovative technologies to meet new demand.³³

Three decades ago, the Commission affirmed precisely that principle when it set about removing “computers” from the ambit of Title II regulation.³⁴ It should do the same for broadband. But, in this context, the Commission needs to go even farther than it did in the *Computer Inquiries*. There, because nascent computer-based information

³¹ *Broadband Today* at 45 (emphasis added); see also *Fixed Wireless Competition Order*, 15 FCC Rcd at 11861, ¶ 8 (regulatory restriction on fixed wireless is warranted only “when there is a significant likelihood of substantial harm to competition in specific markets and when the restriction will be effective in eliminating that harm”).

³² See, e.g., *Second Advanced Services Report* ¶ 246 (“competition, not regulation, holds the key to stimulating further deployment of advanced telecommunications capability”); Report, *In the Matter of Section 257 Report to Congress: Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses*, FCC 00-279, ¶ 20 (rel. August 10, 2000) (“economically unjustified intervention might make it difficult to promote vigorous competition”).

³³ See, e.g., Memorandum Opinion, Order and Authorization, *Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d 1238, 1252, ¶ 34 (1982).

³⁴ See Final Decision, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 28 F.C.C.2d 267 (1973), *aff’d in part sub nom. GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973); see generally J. Oxman, Office of Plans and Policy, FCC, *The FCC and the Unregulation of the Internet*, at 6 (OPP Working Paper No. 31, July 1999) (“The FCC has taken numerous steps since the early days of the telecommunications data services industry three decades ago to permit competitive forces, not government regulation, to drive the success of that industry. . . . [T]he success of the Internet today, is, in part, a direct result of those policies.”).

services were heavily dependent upon the public switched telephone network, the Commission imposed, first, a policy of strict separation, and later an array of unbundling and non-discrimination requirements upon the incumbent telephone companies insofar as they wanted to provide information services.³⁵ But broadband Internet services are not dependent upon the local telephone network. To the contrary, cable is currently the dominant medium, and wireless and satellite technologies are also developing fast. Under these circumstances, telephone companies, cable companies, wireless and satellite providers – all participants should be free to compete in an open market without any restrictions based on the other services they might provide. Those other services provide no special advantages in the provision of high-speed Internet services and hence should carry no special regulatory disabilities.

1. A Market-Based Title I Framework.

Broadband Internet service – the bundled package of transport and content – is an “information service,” subject to Title I. The 1996 Act defines an “information service” as “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”³⁶ Internet service does precisely that.³⁷

³⁵ See Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980) (“*Computer II Final Decision*”) (requiring structurally separate affiliate for incumbent telephone company provision of enhanced services); Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958 (1986) (“*Computer III*”) (imposing comparably efficient interconnection and open network architecture requirements in lieu of structural separation); see also Report and Order, *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 F.C.C.2d 1117 (1983) (“*BOC Separation Order*”) (extending *Computer Inquiries* framework to Bell operating companies created pursuant to MFJ).

³⁶ 47 U.S.C. § 153(20).

³⁷ See, e.g., *Report to Congress*, 13 FCC Rcd at 11529-30, ¶¶ 58-59 (concluding that Internet access is an “information service”); *Advanced Services Order on Remand*, 15 FCC Rcd at 401, ¶ 34 (same); First

Less clear is how to treat broadband Internet service providers who self-provide their own high-speed transport. The Commission has suggested that it might be possible to treat such providers as providing *both* a Title I information service *and* a Title II telecommunications service.³⁸ If so, then cable Internet service providers – the dominant providers (as self-providers) of high-speed transmission – are common carriers, fully subject to Title II.³⁹ We explore the implications of that conclusion in Part II(B) below.

But there is a better way – better as a matter of policy and more in keeping with the language and intent of the 1996 Act. As long as it treats all self-providers of broadband transport the same way, the Commission is not required to adopt a two-hats/two-Titles approach. To the contrary, the Commission's *NARUC I* precedent requires that approach only if cable operators “ha[ve] sufficient market power” over the market for the underlying transport service “to warrant regulatory treatment as a common carrier”; that is the only circumstance in which “the public interest [would] require[] common carrier operation” of the facilities at issue.⁴⁰ Otherwise, the Commission is free

Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, 21967-68, ¶ 127 (1996) (“*Non-Accounting Safeguards Order*”) (same).

³⁸ *Report to Congress*, 13 FCC Rcd at 11530, ¶¶ 59-60 (“Since *Computer II*, we have made it clear that offerings by non-facilities-based providers combining communications and computing components should always be deemed enhanced. But the matter is more complicated when it comes to offerings by facilities-based providers.”); *id.* at 11530, ¶ 69 (in cases where an ISP owns transmission facilities, “[o]ne could argue that [the ISP] is furnishing raw transmission capacity to itself.”).

³⁹ *See, e.g.*, Memorandum Opinion and Order, *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21587-88, ¶ 6 (1998) (a “telecommunications service” is a transmission service provided on a common carrier basis, so “‘telecommunications carrier’ means essentially the same as common carrier”).

⁴⁰ *Id.* at 21589, ¶ 9; Memorandum Opinion, Declaratory Ruling, and Order, *Cox Cable Communications, Inc., Comline, Inc. and Cox DTS*, 102 F.C.C.2d 110, 120-22, ¶¶ 22-28 (1985); *see also NARUC I*, 525 F.2d at 644 n.76 (noting that Commission may “impos[e] [upon a carrier] requirements which . . . ma[ke] them common carriers”); *see generally* M. Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbone*, at 9 (OPP Working Paper No. 32, Sept. 2000) (common carrier regulation “serve[s] to protect against anti-competitive behavior by telecommunications providers with market power. In markets where competition can act in place of regulation as the means to protect

to leave it to the provider to choose whether to offer unadorned common carriage to the general public, or instead, to offer a Title I information-service bundle of content and transmission, or instead, a contract-only (and again, Title I) service to selected customers. Common carriage rules kick-in only if the provider itself *elects* to “make capacity available to the public indifferently.”⁴¹

The relevant question, then, is whether cable operators have “sufficient market power” over the market for broadband access “to warrant regulatory treatment as a common carrier.” It is a close call, and one that depends largely on whether DSL – cable’s principal competitor – is or is not truly free to compete against it. As noted, cable certainly has a dominant share of the market today. The Commission’s own prior reliance on significant “potential” competition in the market to discipline cable implicitly – though counterfactually – assumes that DSL is free to compete against cable, on equal terms.⁴² Only one thing is clear: The Commission cannot reach any principled conclusion about the state of competition in this market, or the actual or potential competition that cable faces, without fully and simultaneously addressing the status of cable’s main competitor. And that depends, in turn, on how the regulatory burdens placed on that competitor compare with those placed on cable itself.

If the Commission sets in place a deregulatory regime that permits true, head-to-head competition between cable and telephone providers of high-speed Internet service, it

consumers from the exercise of market power, the Commission has long chosen to abstain from imposing regulation.”).

⁴¹ See, e.g., *Cable & Wireless PLC*, 12 FCC Rcd 8516, 8522 ¶¶ 14-15 (1997); *Cox Cable*, 102 F.C.C.2d at 121, ¶ 25.

⁴² E.g., *AT&T/MediaOne Order*, 15 FCC Rcd at 9866-68, ¶¶ 116-117; Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc. to AT&T Corp.*, 14 FCC Rcd 3160, 3206, ¶ 94 (1999) (“*AT&T/TCI Order*”).

may then leave it to the competitors themselves to decide how to package their service and, thus, where precisely to locate themselves on the regulatory map. As the Commission has previously noted, market forces alone might ultimately compel cable operators to offer unadorned carrier services to all comers⁴³ – which would then place those services under Title II. The Commission has given other operators – including DBS licensees,⁴⁴ MDS operators,⁴⁵ and satellite carriers⁴⁶ – similar freedom to position their services under one of the several different regulatory models defined in the Communications Act, and incumbent LECs already have that freedom for video.⁴⁷ In those instances, rapid technological advances, the absence of a bottleneck, and the advent of new services supported a market-driven, deregulatory approach, one that would “encourag[e] additional entry, additional facility investment, [and] more efficient use” of resources, while “allow[ing] for technical and marketing innovation in the provision of . . . services.”⁴⁸ And the market upshot has been a healthy mix of common carrier and non-common carrier services.

Conditions in the fast-evolving market for broadband Internet services warrant the same “hands-off” approach here. But that is so if – and only if – there is indeed a *single*

⁴³ *Broadband Today*, at 42.

⁴⁴ *DBS Order*, 90 F.C.C.2d at 706-09, ¶¶ 78-84.

⁴⁵ *MDS Report and Order*, 2 FCC Rcd at 4251-53, ¶¶ 1-16.

⁴⁶ *Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d at 1261, ¶ 56.

⁴⁷ See 47 U.S.C. § 571(a)(2) (“To the extent that a common carrier is providing transmission of video programming on a common carrier basis, such carrier shall be subject to the requirements of [Title II]”); *id.* § 571(a)(3) (“To the extent that a common carrier is providing video programming . . . in any manner other than that described in paragraphs (1) and (2), . . . such carrier shall be subject to the requirements of [Title VI], unless such programming is provided by means of an open video system . . . under section 573 . . .”).

⁴⁸ *Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d at 1255, ¶ 41; see also *World Communications, Inc. v. FCC*, 735 F.2d 1465, 1468 (D.C. Cir. 1984) (“[r]apid technological advances, demand shifts, and changes in entrepreneurial judgments” caution against “an inflexible regulatory regime”).

market for broadband Internet services, in which copper truly can and does compete on equal terms with coax and other technologies, subject to uniform, even-handed, technology-neutral rules.

2. DSL Services Must Likewise Be Regulated Under Title I.

It would be arbitrary and irrational for the Commission to conclude that cable faces significant actual and potential competition, while simultaneously concluding that the broadband service provided by cable's main (though still quite distant) competitor must remain tied up in regulatory knots. That conclusion would also be squarely contrary to Commission precedent. The *NARUC I* analysis looks to *all* competitors in a *single* market. Whatever the underlying economic realities, disparate regulation can make otherwise competitive services non-competitive.

As ILECs have rolled out high-speed Internet services, the Commission has simply assumed, without ever scrutinizing the issue in any depth, that the underlying broadband transmission path *must* be offered on a common carrier basis – if (but only if) it is supplied by telephone companies.⁴⁹ That assumption is unfounded; it is also irreconcilable with the application of a different rule to the cable industry. Incumbent LECs are later entrants to the market in question here, with the smaller market share. If cable operators are to be given the *option* of whether or not to offer high-speed Internet access service on a common-carrier basis, phone companies must be given that option

⁴⁹ See, e.g., *Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24030-31, ¶ 37 (“We note that BOCs offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services.”); see also *GTE Telephone Operating Cos., GTOC Tariff No. 1*, 13 FCC Rcd 22466, 22474-83, ¶¶ 16-32 (1998) (“*GTE ADSL Tariff Order*”) (assuming that ADSL is a common carrier service subject to tariff, and examining its jurisdictional nature to determine whether it should be tariffed at the federal level).

too.⁵⁰ Otherwise, the industries cannot rationally be viewed as competing in the same market.

The Commission certainly has the authority to give phone companies that option.⁵¹ If cable, the dominant provider of broadband transport, is to be deregulated on the ground that it faces lots of actual or potential competition, then telephone, the nondominant competitor, cannot simultaneously remain regulated on the ground that it possesses, in the same market, an exclusive bottleneck.⁵²

The Commission should therefore repudiate all requirements that incumbent LECs provide the xDSL-based transmission path as a common carrier service. Only if an ILEC *elected* to provide broadband data transmission as a common carrier service would it be subject to Title II regulation (and only minimal such regulation, pursuant to the ILEC's nondominant status, *see infra* pp. 38-42). Where an ILEC instead opts to provide only a bundled high-speed Internet service, the service should be a Title I "information service" – exactly like the indistinguishable, bundled, high-speed Internet service offered by the cable company against which the ILEC's service can and should directly compete.

⁵⁰ The fact that the Commission requires ILECs to file tariffs for their DSL offerings, *see GTE ADSL Tariff Order*, 13 FCC Rcd at 22466, ¶ 1, should not preclude ILECs from having the same election as cable operators. The Commission has ample authority to relieve these tariffing obligations. *See infra* n.51.

⁵¹ *See Cable Landing License, AT&T Submarine Systems, Inc.*, 11 FCC Rcd 14885, 14886, ¶ 2 (1996) (the Commission may "change the regulatory status" of a common carrier service based on market conditions.); *see also Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (upholding *Computer II* decision to detariff service elements that had been treated as common carrier offerings; further investigation had revealed them not to be common carriage communications offerings within the meaning of the Act); *World Communications*, 735 F.2d at 1468 (upholding FCC decision to allow the outright sale of satellite transponders that had been used to provide common carriage; FCC made a "modest adjustment" to changed market circumstances).

⁵² *See ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) ("[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.") (internal quotation marks omitted); *see also Computer II Final Decision*, 77 F.C.C.2d at 434, ¶ 129 (Commission's "rulemaking power is expressly confined to promulgation of regulations that serve the public interest," and a regulation "depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears.") (internal quotation marks omitted).

The Commission must likewise repudiate the rules it recently promulgated that require ILECs to provide unbundled access to spectrum – *i.e.*, to the high frequency portion of the copper loop.⁵³ Section 251(c)(3) requires unbundling of “network elements,” which the statute defines as “facilit[ies] or equipment used in the provision of a telecommunications service.”⁵⁴ If an ILEC does not opt to offer its xDSL-enabled transmission path as a “telecommunications service” at all, that portion of the loop cannot be treated as a “network element.” The Commission would remain free, of course, to continue requiring the unbundling of the *narrowband* portion of the loop – *i.e.*, “the transmission frequencies . . . used for analog voice service on any lines that LECs use to provide exchange service.”⁵⁵

And the Commission is required, moreover, to de-UNE-fy elements insofar as competition would not be “impaired” by their disappearance. *See* 47 U.S.C. § 251(d)(2); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999). Cable – the dominant competitor in this market – plainly does not rely on ILEC copper to compete, nor does fixed wireless or satellite. If robust competition in the market does not require the unbundling of *cable*’s dominant spectrum, it surely cannot require the unbundling of the *ILEC*’s nondominant spectrum.

⁵³ *See Line Sharing Order*, 14 FCC Rcd at 20921, ¶ 13.

⁵⁴ 47 U.S.C. § 153(29); *see also Local Competition Order*, 11 FCC Rcd at 15632-33, ¶ 261 (noting that the statute confines the term “network elements” to facilities used by the ILEC in the provision of a telecommunications service).

⁵⁵ First Report and Order and Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, 4808, ¶ 99 (1999) (“*Collocation Order*”). Although a proper application of sections 251(c)(3) and (d)(2) would result in unbundling only the narrowband frequency of the loop, it may be the case that, as a matter of pure administrative convenience, a CLEC that took an entire loop would be entitled to use the high frequency portion along with the voice channel. *See, e.g., Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 439 (6th Cir. 1998) (“The consideration of administration costs is a natural component to the consideration of competition and the effect of the proposed rule on the relevant markets.”).

All ancillary “spectrum unbundling” regulations must go, too. Loop qualification mandates, for example.⁵⁶ Loop conditioning mandates as well.⁵⁷ The DSL-related performance reporting and penalty plan requirements the Commission has imposed as conditions to section 271 and merger approvals.⁵⁸ If robust competition in the market does not require imposing any comparable requirements on cable’s *dominant* spectrum, it surely cannot require maintaining such requirements on the ILEC’s *nondominant* spectrum.

Collocation regulations must be scaled back as well – rather than expanded, as some have proposed in the Commission’s pending collocation docket. These commenters claim that collocation of advanced services equipment is necessary to permit access and interconnection to the high frequency portion of the loop.⁵⁹ But if robust competition in the market does not require the imposition of such collocation or

⁵⁶ See, e.g., Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3885, ¶ 427 (1999) (“UNE Remand Order”) (ILEC must provide requesting carriers “with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent”).

⁵⁷ See *id.* at 3783-84, ¶¶ 190-191 (ILECs must condition loops before delivery to ensure that requesting carriers are able to provision advanced services over existing copper loops, even if the ILEC itself is not offering xDSL to the end-user customer on that loop and would not otherwise condition the loop).

⁵⁸ Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control*, 14 FCC Rcd 14712, 14867-70, 15047-48, ¶¶ 377-383 & Att. A-1a (1999) (“SBC/Ameritech Order”); Memorandum Opinion and Order, *Applications of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control*, CC Docket No. 98-184, FCC 00-221, ¶¶ 279-284 & Att. A-1a (rel. June 16, 2000) (“Bell Atlantic/GTE Order”); Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, CC Docket No. 00-65, FCC 00-238, ¶ 425 (rel. June 30, 2000); Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 4170, ¶ 439 (1999) (“New York Order”).

⁵⁹ See, e.g., Reply Comments of Network Access Solutions at 4, CC Docket Nos. 98-147 & 96-98 (FCC filed Nov. 14, 2000); Reply Comments of Sprint Corp. at 3, CC Docket Nos. 98-147 & 96-98 (FCC filed Nov. 14, 2000); Reply Comments of Advanced Telecom Group, Inc. at 11, CC Docket Nos. 98-147 & 96-98 (FCC filed Nov. 14, 2000).

interconnection obligations on *cable*, the dominant providers of high-speed Internet services, it surely cannot require their imposition on ILECs, the nondominant competitors.

InterLATA restrictions must also be eliminated, insofar as they have been (unlawfully) extended to Internet services.⁶⁰ Section 271 applies to BOC *provision* of “interLATA services,” 47 U.S.C. § 271(a), which are defined in turn as “telecommunications” between LATAs, 47 U.S.C. § 153(21). As the Commission has held, an information service provider that transmits information across LATA boundaries “does not [thereby] *provide* telecommunications”; rather, “it is *using* telecommunications” to provide its information service.⁶¹ InterLATA information services therefore do not fall within “interLATA services” in section 271(a). The Commission has yet to provide a reasoned basis for its decision to the contrary, and cannot in any event reconcile any such ruling with the plain language of the 1996 Act.⁶²

ILECs must likewise be freed of any obligation to permit the discounted resale of their high-speed Internet services. Section 251(c)(4) applies by its terms to “telecommunications services.” Incumbents that choose not to make the xDSL-enabled transmission path available as a “telecommunications service” would obviously not have to provide that service to resellers at a mandatory discount.

⁶⁰ See *Non-Accounting Safeguards*, 11 FCC Rcd at 21932-33, ¶ 56.

⁶¹ *Report to Congress*, 13 FCC Rcd at 11521, ¶ 41 (emphases added).

⁶² The Commission recently indicated that it may reconsider this decision pursuant to a remand from the D.C. Circuit. Public Notice, *Comments Requested in Connection with Court Remand of Non-Accounting Safeguards Order*, CC Docket No. 96-149, DA 00-2530 (rel. Nov. 8, 2000).

Finally, the Commission must repudiate the quasi-regulatory separate affiliate conditions that it has imposed (in approving recent mergers) on two providers of high-speed Internet service,⁶³ and that it has hinted that it may extend to others through the 271 process.⁶⁴ The Commission has justified the conditions on the ground that incumbent LECs have the “incentive and ability” to discriminate against competing providers of advanced services.⁶⁵ But if robust competition in the market does not require the establishment of separate affiliates by *cable*, the dominant provider of high-speed Internet services,⁶⁶ it surely cannot require such separation by *ILECs*, the nondominant competitors.

3. Intermediate Title I Regulation: Comparably Efficient Interconnection to Both Coax and Copper.

While the existing regulatory regime is untenable, the Commission may nevertheless be unprepared to adopt a fully deregulatory Title I model for the provision of high-speed Internet service, for fear that it would limit growth among independent ISPs – *i.e.*, ISPs that are not affiliated with broadband transmission providers.⁶⁷ In that case, the Commission may seek a regulatory framework that would facilitate the development of the independent ISP industry, while allowing transmission providers to retain control over the management and deployment of their high-speed networks.

⁶³ See *SBC/Ameritech Order*, 14 FCC Rcd at 14859, ¶ 363; *Bell Atlantic/GTE Order* ¶ 260.

⁶⁴ See *New York Order*, 15 FCC Rcd at 4122-23, ¶ 331.

⁶⁵ See *SBC/Ameritech Order*, 14 FCC Rcd at 14795-96, ¶ 187; *Bell Atlantic/GTE Order* ¶ 181.

⁶⁶ See, e.g., *AT&T/MediaOne Order*, 15 FCC Rcd at 9866-73, ¶¶ 116-127 (declining to impose conditions related to potential competitive harm in broadband access).

⁶⁷ See *id.* at 9866, ¶ 116 (noting that the ability of consumers to choose among a number of viable, alternative ISPs is relevant to its public interest analysis).

The Commission has already developed a model for doing exactly that. In its pre-1996 *Computer Inquiries*, the Commission sought to facilitate the development of the “enhanced services” market (which Congress has since renamed the “information services” market).⁶⁸ The Commission accomplished this by requiring the largest telephone companies to “virtually unbundle” a “basic” transmission service from any “enhanced” service offering, and to offer that basic service to other “enhanced service” providers pursuant to a “comparably efficient interconnection” (CEI) or “open network architecture” (ONA) plan approved by the Commission.⁶⁹

The Commission has ample authority to impose a similar regime – uniformly, and across the board – on all major providers of high-speed Internet service. The *Computer Inquiries* rules themselves are self-evidently inapplicable, of course, for they are squarely grounded on the premise that the largest telephone companies control an *exclusive* “bottleneck” in the relevant transmission facility,⁷⁰ a premise that is absent in the

⁶⁸ See generally *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21968-72, ¶¶ 128-137 (noting that the *Computer Inquiries*’ “basic”/“enhanced” service dichotomy was precursor the Act’s “telecommunications service”/“information service” split, and discussing application of *Computer II*, *Computer III*, and *ONA* requirements on BOC provision of intraLATA information services).

⁶⁹ See, e.g., Memorandum Opinion and Order, *Petition for Declaratory Ruling That AT&T’s Interspan Frame Relay Service is a Basic Service*, 10 FCC Rcd 13717, 13719, ¶¶ 13-14 (1995) (*Computer II* and *Computer III* together require that carriers that own “transmission facilities and provide enhanced services must unbundle” the transmission path and provide it to other enhanced service providers “under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations.”); Report and Order, *Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services*, 14 FCC Rcd 4289, 4297-99, ¶ 13 (1999) (“*Computer III Further Remand Order*”) (describing the parameters of CEI plans).

⁷⁰ See *Computer II Final Decision*, 77 F.C.C.2d at 468, ¶¶ 219-220 (“The importance of the control of local facilities . . . cannot be overstate[d]. . . . [O]ur regulatory concerns [are] directed at monopoly telephone companies exercising significant market power on a broad geographic basis.”); *BOC Separation Order*, 95 F.C.C.2d at 1119-20, ¶ 2, 1128, ¶ 23 (*Computer II* structural separation was justified by Bell company’s “control of bottleneck facilities”); *id.* at 1132, ¶ 38 (BOCs are in control of the “basic transmission network”); *Computer III*, 104 F.C.C.2d at 1060, ¶ 203 (to ensure that competition prevailed in the provision of enhanced services, “all would-be providers” of such services should be guaranteed “relatively equal costs of interconnection to the bottleneck”) (quoting DOJ comments); *id.* at 1057, ¶ 195 (noting that “ISDN system architecture” would require a policy of comparably efficient interconnection “to sustain effective competition” only if the architecture has “‘bottleneck’ characteristics”); see also Memorandum

broadband context. But if the Commission believes that a *Computer Inquiries*-like framework is necessary to facilitate competition among independent ISPs, it may, in the exercise of its Title I authority, resurrect that framework and apply it to the leading self-providers of transport in the high-speed Internet market.⁷¹

If the Commission opts to settle for this sort of “virtual unbundling” of broadband, however, it must settle there for everyone. The incumbent LECs’ *actual* unbundling requirements, and all the attendant Title II-based obligations discussed above, would have to be replaced with this new Title I framework. Again, there can be no basis for subjecting the nondominant provider of broadband access to an open access regime that is more intrusive than that imposed upon the dominant provider.

B. IF TITLE II IS TO GOVERN THE UNDERLYING TRANSMISSION PATH, IT MUST DO SO EQUALLY FOR DSL AND FOR CABLE MODEM SERVICE.

At the end of the day, the Commission may have less faith in the marketplace than in its own ability to shape and manage competition. The Commission may accordingly opt to distinguish between the information services portion of broadband Internet service

Opinion and Order on Reconsideration, *Competition in the Interstate Interexchange Marketplace*, 10 FCC Rcd 4562, 4579, ¶ 38 (1995) (“the need for CEI requirements in connection with the streamlined service is obviated by the existence of substantial competition for that service”).

⁷¹ See *Computer and Communications Indus. Ass’n*, 693 F.2d at 214-18 (upholding FCC Title I authority to preempt state regulation over CPE); Further Notice of Proposed Rulemaking, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 13 FCC Rcd 21531, 21547, ¶ 30 (noting Commission authority under Title I to regulate facilities used for both interstate and intrastate communications). There is no doubting the technical feasibility of this approach. See, e.g., Declaration of Albert Parisian, Petition of GTE Serv. Corp., et al., *Application for Transfer of Control of Licenses of MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251 (FCC filed Aug. 23, 1999) (documenting success of GTE’s efforts to provide unaffiliated ISPs with access to cable modem customers); Report to the Subcomm. on Antitrust, Business Rights and Competition, Committee on the Judiciary, U.S. Senate, *Technological and Regulatory Factors Affecting Consumer Choice of Internet Providers*, at 60 (GAO Oct. 2000) (noting that “no technical impediments had been found in the [Canadian] technical trial to allow third-party ISP interconnection to the cable modem platform”).

and the underlying broadband transmission path, deregulating the former under Title I, while continuing to impose Title II regulation on the latter.

That is a decidedly second-best, but still defensible, option. It is defensible, however, only if the Commission uses its Title II authority to establish regulatory parity between ILECs, the nondominant providers of high-speed Internet services, and cable, the dominant provider. In other words, the same open access requirements that currently apply to ILEC DSL operations must be extended to cable operators offering cable modem service. That cable operators currently elect to bundle their information service with the underlying transmission path cannot be dispositive – no more (or less) so than such an election is dispositive if made by a phone company. As the Ninth Circuit recently made clear, cable is quite as able as any phone company to wear two regulatory hats simultaneously: “[t]o the extent [the cable Internet service provider] is a conventional ISP, its activities are that of an information service. However, to the extent that [it] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.”⁷²

1. The Commission Has Statutory Authority to Impose Title II Regulations on Cable Modem Providers.

If the Commission decides to take the two hats/two Titles approach, then it must classify broadband transmission, by whatever technology, as a “telecommunications service.” As the Commission has already explained, the cable modem platform is simply

⁷² See *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000); see also *Cox to Cease Paying Franchise Fees for Cable Modem Service*, Communications Daily (Nov. 21, 2000) (noting Cox’s position that under *City of Portland* cable-delivered Internet service, unlike other services delivered over a cable system, is not a cable service and therefore not subject to local franchise fees).

one type of content-free “advanced service.”⁷³ And “advanced services” are themselves “telecommunications services.”⁷⁴

The Commission’s recent *Advanced Services Order on Remand* concluded that high-speed Internet service provided over DSL can be both “telephone exchange service” and “exchange access” (both of which are “telecommunications services”⁷⁵). It is telephone exchange service insofar as it “permit[s] ‘intercommunication’ within the equivalent of a local exchange area,” and is “covered by ‘the exchange service charge’” (which requires only that the service be covered by a “service and payment agreement”).⁷⁶ And it is “exchange access” insofar as it “facilitates the delivery” of an information service that includes as an underlying component the “telephone toll service used to transport the ISP’s Internet access service.”⁷⁷

⁷³ E.g., *Second Advanced Services Report* ¶ 29 (“Cable companies offer advanced services, most notably high-speed Internet access services, using cable modem technologies.”); see also *Federal-State Joint Conference on Advanced Telecommunications Services*, 14 FCC Rcd 17622, 17622, ¶ 1 & n.2 (1999) (“We use the terms ‘advanced telecommunications services’ and ‘advanced services’ to mean ‘high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.’”); *Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24014, ¶ 3 (“advanced services” are “wireline, broadband telecommunications services, such as services that rely on digital subscriber line technology . . . and packet-switched technology”).

⁷⁴ E.g., *Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24029, ¶ 35 (“We conclude that advanced services are telecommunications services.”); *Collocation Order*, 14 FCC Rcd at 4770, ¶ 18 (“the actions we take today pursuant to the Act apply to all telecommunications services, whether traditional voice services or advanced services”); *Second Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 8694, 8696, ¶ 3 (1999) (“we will consider . . . how the unbundling obligations of the Act can best facilitate the rapid and efficient deployment of all telecommunications services, including advanced services”).

⁷⁵ See 47 U.S.C. § 153(16), (47); see, e.g., *Local Competition Order*, 11 FCC Rcd at 15679, ¶ 356; *UNE Remand Order*, 15 FCC Rcd at 3911-12, ¶ 484; *Advanced Services Order on Remand*, 15 FCC Rcd at 391-92, ¶ 16.

⁷⁶ *Advanced Services Order on Remand*, 15 FCC Rcd at 395-96, ¶ 23, 398, ¶ 27; see 47 U.S.C. § 153(47)(A); see also *id.* § 153(47)(B) (“telephone exchange service” includes “comparable service provided through a system of . . . facilities . . . by which a subscriber can originate and terminate a telecommunications service”).

⁷⁷ See *Advanced Services Order on Remand*, 15 FCC Rcd at 402-03, ¶ 37.

By exactly the same legal logic, a cable-based self-provider of high-speed Internet access service is likewise engaged in the provision of “telephone exchange service” and “exchange access.” Both services are doing *precisely* the same thing – providing (implicitly, under the two-hat theory) a high-speed packet-switched service to end users. The *only* difference is that one is on hybrid fiber-coax, the other on copper (or, increasingly, hybrid fiber-copper). But the Commission itself has squarely held that the “plain language of the statute . . . refutes any attempt to tie [the telephone exchange service or exchange access] statutory definitions to any particular technology.”⁷⁸

The Commission, Congress, and the courts have long recognized that cable operators are common carriers to the extent they provide telecommunications services. The Commission extended common-carrier regulation to cable operators as early as 1962 – and did so, tellingly, in a case involving *self-provision* of carriage by a cable operator to “itself or an entity closely affiliated with itself.”⁷⁹ In 1985, the Commission sized up a cable operator’s “institutional” high-speed digital transmission services against Title II definitions, concluding that they fell outside only because they had not been offered to

⁷⁸ *Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24032, ¶ 41 (“Nothing in the statutory language or legislative history limits these terms to the provision of voice, or conventional circuit-switched service.”); *see also Advanced Services Order on Remand*, 15 FCC Rcd at 395, ¶ 21 (“‘telephone exchange service’ encompasses voice and data services”).

⁷⁹ *See* Initial Decision, *Application of Carter Mountain Transmission Corp.*, 32 F.C.C. 468, 483 (1961). In the Initial Decision, which was adopted by the FCC except as to the public interest determination, *see* Decision, *Application of Carter Mountain Transmission Corp.*, 32 F.C.C. 459, 460, ¶ 2 (1962), *aff’d*, *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359, 361 (D.C. Cir. 1963), the Hearing Examiner explained: “[T]he status of a communications common carrier initially obtains as a result of the bona fide offer of an entity to serve the public upon reasonable request, and without discrimination, pursuant to legally applicable tariffs. That the purported carrier initially proposes to serve, in addition to other members of the public, itself or an entity closely affiliated with itself, has been regarded by the Commission and its predecessor agencies as immaterial at the time of commencement of service. Common carriage is not lacking merely because a considerable portion of a company’s business consists of communications service carried for itself or for the industry with which it is associated.” Initial Decision, 32 F.C.C. at 483.

the general public.⁸⁰ And the Commission has recognized that cable operators operate as common carriers when they provide competitive access services,⁸¹ wireless telephone services,⁸² and long-distance phone services.⁸³ For its part, Congress in the 1984 Cable Act expressly provided that the Commission or a state could require the filing of informational tariffs for non-cable communications services provided over a cable system.⁸⁴ The 1996 Congress similarly understood that cable operators can and do provide telecommunications services over their networks.⁸⁵ The courts, too, have reached a similar conclusion.⁸⁶

The Commission's authority to impose ILEC-like open access regulation on cable follows ineluctably from the classification of cable modem service as a

⁸⁰ See *Cox Cable*, 102 F.C.C.2d at 120-21, ¶ 24.

⁸¹ Memorandum Opinion and Order, *Application of Teleport Communications-New York for Transfer of Control of Stations WLU372, WLW316 and WLW317 from Merrill Lynch Group, Inc. to Cox Teleport, Inc.*, 7 FCC Red 5986, 5988, ¶¶ 16-18 (1992) ("Teleport Order").

⁸² See Tentative Decision and Memorandum Opinion and Order, *Amendment of the Commission's Rules To Establish New Personal Communications Services*, 7 FCC Red 7794, 7799-802, ¶¶ 12-18 (1992) (tentatively granting PCS license to Cox Cable for use in connection with its cable plant).

⁸³ *Teleport Order*, 7 FCC Red at 5988, ¶ 16 (citing Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice Of Inquiry, *Telephone Company Cable Television Cross-Ownership Rules*, Sections 63.54-63.58, 7 FCC Red 300, 322-23, ¶ 46 (1991)).

⁸⁴ See 47 U.S.C. § 541(d)(1); see also H.R. Rep. No. 98-934, at 27, 29 (noting the "two-way capacities of cable systems to provide communications services," and explaining that the purpose of what is now section 541(d)(1) was to "preserve[] the regulatory and jurisdictional status quo with respect to non-cable communications services"); *id.* at 41-42 ("[The] legislation does not affect existing regulatory authority over the use of a cable system to provide non-cable communications services, such as private line data transmission or voice communication, that compete with services provided by telephone companies.").

⁸⁵ See 47 U.S.C. § 541(b)(3) (exempting a cable operator's provision of telecommunications services from Title VI and franchise requirements); *id.* § 224(d)(3) (authorizing the FCC to establish rates for pole attachments "used by a cable system . . . to provide any telecommunications service"); see also Joint Explanatory Statement at 169 ("The amendment [to the definition of cable service] is not intended to affect Federal or State regulation of telecommunications service offered through cable system facilities.") (emphasis added).

⁸⁶ See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 n.9 (1979) ("A cable system may operate as a common carrier with respect to a portion of its service only."); *NARUC II*, 533 F.2d at 609 (two-way, point-to-point, non-video communication transmitted over cable channels involves "common carrier activity," regardless of usual status of entity providing the service).

telecommunications service provided by a common carrier.⁸⁷ Under section 251(a), for example, the Commission has broad authority “to require interconnection,” “even in the ISP self-provisioning context,” in accordance with standards established by the Commission pursuant to section 256.⁸⁸ Section 201(a) likewise authorizes the imposition of interconnection obligations.⁸⁹ Indeed, the Commission has long recognized that “the language of Section 201 of the Act is general,” and that the relevant question is simply whether a carrier’s refusal to permit interconnection “restrict[s] [its] customers’ freedom of choice by limiting the means through which they can satisfy their communications needs.”⁹⁰ By refusing to interconnect with ISPs, cable operators “unduly hamper[] the free exercise of customer choice,” and therefore run afoul of section 201(a).⁹¹

⁸⁷ See 47 U.S.C. § 153(44) (“The term ‘telecommunications carrier’ means any provider of telecommunications services”); *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 922 (D.C. Cir. 1999) (upholding FCC’s interpretation of “telecommunications carrier” to mean “‘essentially’ the same thing as ‘common carrier’”).

⁸⁸ *Advanced Services Order on Remand*, 15 FCC Rcd at 403, ¶ 38; see also *Local Competition Order*, 11 FCC Rcd at 15990, ¶ 995 (“if a company provides both telecommunications and information services, it . . . is subject to the obligations under section 251(a)”). Section 256 directs the Commission to “promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks used to provide telecommunications service” and to “ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks.” 47 U.S.C. § 256(a); cf. *Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1435-36, ¶¶ 56, 57 (1994) (the term “interconnection with the public switched network” extends to interconnection through a data circuit).

⁸⁹ See 47 U.S.C. § 201(a), (b) (every “common carrier” engaged in “interstate or foreign communication” must provide such communications “upon reasonable request therefor” and on terms that are “just and reasonable”); *GTE ADSL Tariff Order*, 13 FCC Rcd at 22466, ¶ 1 (GTE’s ADSL service, “which permits [ISPs] to provide their end user customers with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level”); *Advanced Services Order on Remand*, 15 FCC Rcd at 403, ¶ 38 (noting Commission’s “authority to require interconnection” to ISPs under “section[] 201(a)”); cf. *AT&T Corp.*, 525 U.S. at 377-78 (Commission’s authority under section 201(b) is co-extensive with the Communications Act).

⁹⁰ Memorandum Opinion and Order, *Restrictions on Interconnection of Private Line Services*, 60 F.C.C.2d 939, 943-44, ¶ 13 (1976) (“*Private Line Services Order*”); see also *Washington Utils. & Transp. Comm’n v. FCC*, 513 F.2d 1142 (9th Cir. 1975); *Bell Tel. Co. of Pennsylvania v. FCC*, 503 F.2d 1250 (3d Cir. 1974); 47 U.S.C. § 251(i) (“[n]othing in [section 251] shall be construed to limit or otherwise affect the Commission’s authority under section 201”).

⁹¹ *Private Line Services Order*, 60 F.C.C.2d at 943, ¶ 13.

The Commission also has statutory authority to classify cable operators as “comparable” to an incumbent LEC and therefore subject them directly to the obligations of section 251(c).⁹² As an initial matter, cable operators – no less than telephone companies – may be treated as “local exchange carriers” when they provide Internet access over self-provided transmission.⁹³ And, as the Commission has explained, a local exchange carrier will be deemed “comparable” to an ILEC where it “occup[ies] a dominant position in the market for telephone exchange service in [its] operating area[], and possess[es] economies of density, connectivity, and scale that make efficient competitive entry quite difficult, if not impossible, absent compliance with the obligations of section 251(c).”⁹⁴ Cable operators are unquestionably dominant in the broadband market – which, as the Commission has found, is a local exchange market – and if the regulatory burdens imposed on the nondominant ILECs are necessary to facilitate competitive entry, it must be the case that they are necessary for cable operators as well.

2. Implementation of the Title II Model for Cable Modem Providers.

If the Commission takes the Title II option for underlying broadband transport, it must establish regulations governing cable modem service comparable to those that apply to ILECs offering DSL. The rationale for both sets of regulations is the same, and policy

⁹² See 47 U.S.C. § 251(h)(2); *In re Guam Pub. Utils. Comm’n*, 12 FCC Rcd 6925 (1997) (“*Guam PUC*”).

⁹³ See *Advanced Services Order on Remand*, 15 FCC Rcd at 394, ¶ 20, 401-02, ¶ 35; *supra* pp. 27-28; 47 U.S.C. § 153(26) (“The term ‘local exchange carrier’ means any person that is engaged in the provision of telephone exchange service or exchange access.”).

⁹⁴ *Guam PUC*, 12 FCC Rcd at 6941, ¶ 26; see also *id.* at 6944-45, ¶ 33 (noting importance of a carrier’s “substantial financial resources, significant economies of density, connectivity, and scale, and, most importantly, control of the bottleneck local exchange network”).

considerations demand parity in the provision of what is, despite variances in technology, the same service.

Spectrum Unbundling. If protecting competition in the market for high-speed Internet services requires “spectrum unbundling” in nondominant copper, it assuredly requires spectrum unbundling in dominant coax, too. The Commission has already concluded it has the discretion to impose spectrum unbundling on ILECs; if so, it clearly has the authority to impose spectrum unbundling on cable, along with such ancillary regulatory burdens as “loop conditioning” (in its cable equivalent) and the compliance-monitoring and reporting procedures that will permit the Commission to monitor cable’s ultimate compliance with the spectrum unbundling mandate.

Cable spectrum is already “unbundled” in some degree, of course – cable operators are required to set aside video channels for use by various third parties.⁹⁵ In terms of spectrum required, a cable modem service requires two channels: one channel for downstream traffic and another channel for upstream signals, each consisting of approximately six MHz.⁹⁶ Upgraded cable systems – *i.e.*, those that are capable of providing cable Internet service – typically have a bandwidth of between 550 and 750 MHz, approximately ten percent of which is unused.⁹⁷

⁹⁵ See, e.g., 47 U.S.C. § 532(b)(1) (“A cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator”); see also *id.* § 522(4) (a “channel” is “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel”); see generally *Midwest Video*, 440 U.S. 689.

⁹⁶ See Cable Datacom News, *Overview of Cable Modem Technology and Services*, <http://www.cabledatcomnews.com/cmhc/cmhc1.html> (“To deliver data services over a cable network, one television channel (in the 50-750 MHz range) is typically allocated for downstream traffic . . . and another channel (in the 5-42 MHz band) is used to carry upstream signals.”).

⁹⁷ *McKinsey Broadband Report* at 39 (“approximately 90%” of upgraded cable capacity “is taken up by traditional video services,” and cable operators have “tremendous flexibility to reallocate system bandwidth”).

Any claim that hybrid fiber-coax is too limited to support unbundling is indefensible, especially when placed side by side with the conclusion that spectrum unbundling makes perfect sense in the much narrower capacity of copper wires. Both Congress and the Commission itself have already devised allocation formulas to address such “too-little-capacity” objections. The formula for commercial leased access, for example, allows competitor access to a percentage of the total activated channels on a cable system.⁹⁸ The 1996 Act includes a similar formula for competitor access to capacity on an OVS platform.⁹⁹ And there is, indeed, no reason at all that the cable operator itself should retain the right to end up operating *any* of the broadband spectrum on its wires. If a telephone company’s customer opts for service from an unaffiliated ISP, the telephone company must surrender to its competitor the *entire* high-speed channel on that customer’s line.¹⁰⁰ The FCC could easily fashion rules that allow cable customers a similar selection.

Cable operators may not duck interconnection obligations on the grounds of technical infeasibility, either. Open access poses no risk at all to cable systems, much less the “substantial risk” that Commission precedent establishes as the threshold for avoiding interconnection.¹⁰¹ That incumbent cable operators already connect with an

⁹⁸ See 47 U.S.C. § 532(b)(1) (an operator with between 36 and 54 channels must designate 10 percent of channels not otherwise required for use by law; an operator with between 55 and 100 channels must designate 15 percent of channels not otherwise required for use by law).

⁹⁹ If demand for carriage exceeds capacity, the open video system operator may select the programming services to be carried on no more than one-third of the system’s activated channel capacity. See 47 U.S.C. § 573(b)(1)(B); 47 C.F.R. § 76.1503(c); Second Report and Order, *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd 18223, 18248, ¶ 37 (1996).

¹⁰⁰ See *Line Sharing Order*, 14 FCC Rcd at 20917, ¶ 6.

¹⁰¹ See, e.g., Decision, *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, 424 (1968); see also *Hush-a-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956) (a customer is free to use communications services in ways which are “privately beneficial without being publicly detrimental”).

affiliated ISP, and provide data transmission capacity over hybrid fiber-coax to that ISP, is evidence that transmission capacity can be provided (and spectrum isolated) to unaffiliated providers without adversely affecting traditional cable services.¹⁰² To the extent that allocation of data channels may cause the cable equivalent of intermodulation or guardband distortions, the FCC must require cable operators, as it has done for ILECs in its *Line Sharing Order*, to remedy such problems.¹⁰³ Claims of technical infeasibility can be addressed in Commission proceedings or in industry standards bodies, such as NRIC, a federal advisory committee that has been authorized by the Commission under section 256 to recommend standards on spectrum compatibility and spectrum management practices for DSL.¹⁰⁴

All of the technical infeasibility arguments were made to – and rejected by – the Commission in the context of ILEC spectrum unbundling. The Commission justified imposing spectrum unbundling on the grounds that it would lower entry barriers, increase competition, accelerate the roll-out of broadband services, and prevent ILECs from leveraging their dominant position in the local exchange market into adjacent content markets.¹⁰⁵ These economic rationales must apply with even greater force to a dominant

¹⁰² See *Line Sharing Order*, 14 FCC Rcd at 20943, ¶ 63 (relying on the fact that ILECs “already provide both analog voice and high-speed data services over one loop by connecting the local loop facility to their DSLAM to utilize the loop’s non-voiceband frequency data transmission capability for their own xDSL services”).

¹⁰³ The FCC has raised the bar even higher: line sharing will not be considered technically infeasible unless the ILEC can demonstrate to the state commission that DSL conditioning “would interfere with the analog voice service of the line.” *Id.* at 20952, ¶ 81. Cable, with wires more capacious than the copper pair, must be held to the same standard.

¹⁰⁴ See *id.* at 20992-93, ¶ 184. Pursuant to section 256, the Commission could also establish rules for the equivalent of “loop conditioning” and “performance measurements” on cable networks.

¹⁰⁵ See *Line Sharing Order*, 14 FCC Rcd at 20916, ¶ 5 (lack of access “materially diminishes the ability of competitive LECs to provide certain types of advanced services to residential and small business users, delays broad facilities-based market entry, and materially limits the scope and quality of competitor services offerings”); *id.* at 20930, ¶ 35 (“we find that unbundled access to the high frequency portion of the

competitor than they do to a nondominant one.¹⁰⁶ Cable has more power than an ILEC – not less – to leverage its monopoly power over cable plant into the adjacent ISP market.¹⁰⁷ Cable’s protest that regulation will “deter investment” must hold less sway than any ILEC’s since cable already dominates this market.¹⁰⁸

Collocation. The Commission has advanced similar justifications for requiring ILECs to give competitors space to install advanced services equipment – even to the point of requiring telephone companies to permit collocation in “adjacent controlled environmental vaults” on ILEC property if there is not enough space in an ILEC’s central office.¹⁰⁹ Requiring cable operators to allow collocation of competitors’ broadband equipment in the cable company’s head-end offices will – in light of cable’s dominant

loop offers the best opportunity to see these nascent markets evolve into competitive markets”); *UNE Remand Order*, 15 FCC Rcd at 3783, ¶ 190 (without access to DSL-capable loops, ILECs, “rather than the marketplace, would dictate the pace of deployment of advanced services”); *Computer III Further Remand Order*, 14 FCC Rcd at 4295, ¶ 9 (“BOCs remain the dominant providers of local exchange and exchange access services in their in-region states, and thus continue to have the ability to engage in anticompetitive behavior against competitive ISPs.”) (footnote omitted).

¹⁰⁶ *Line Sharing Order*, 14 FCC Rcd at 20929, ¶ 32 (noting necessity of considering actual market activity).

¹⁰⁷ Anticompetitive abuses in adjacent content markets led Congress to pass the 1992 Cable Act prohibiting cable operators from leveraging their control over both the conduit and content markets against unaffiliated distributors and programmers. Following antitrust suits filed by the Department of Justice, incumbent cable operators entered consent decrees that required them to unbundle transport and content, with conditions similar to those proposed here. See *United States v. Primestar Partners, L.P.*, 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994); *New York v. Primestar Partners, L.P.*, 1993-2 Trade Cas. (CCH) ¶ 70,403 (S.D.N.Y. 1993).

¹⁰⁸ *UNE Remand Order*, 15 FCC Rcd at 3760, ¶ 139 (“We therefore do not find merit in arguments that the adoption of a list of network elements that must be unbundled nationwide will discourage innovation and investment by incumbent or competitive LECs.”).

¹⁰⁹ See Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 00-297, ¶ 10 (rel. Aug. 10, 1999) (“The ability of competitive LECs to collocate equipment is particularly important to facilities-based competition for advanced telecommunication services.”); *id.* ¶ 17 (collocation rules “reduce barriers to entry and speed the development of competition”); *id.* ¶ 43 (requiring collocation in adjacent controlled environmental vaults when space is otherwise exhausted “ensur[es] that competitive LECs can compete with the incumbent LEC even when no physical collocation space is available within an incumbent LEC structure”).

status – do even more to advance competition in the high-speed Internet market than requiring the same of nondominant phone companies.

InterLATA Services Restriction. As noted above, *see supra* p. 22, the Commission is currently weighing whether the Section 271 interLATA prohibition applies to information services, and in particular information services that involve self-provided transport. In our view, and for the reasons given in our comments in that proceeding, the interLATA prohibition does not apply.¹¹⁰ To the extent, however, that the Commission concludes that the underlying transport is a separate telecommunications service subject to the restriction, considerations of parity and policy require a similar restriction on the providers of cable modem service.

Under such circumstances, local cable operators must be required to sever all connections with providers of backbone Internet services, at least until they have satisfied the Commission that their cable networks have been duly unbundled and interconnected with competitors. The section 271 restriction is premised on the assumption that a dominant player in local markets can gain unfair competitive advantage in long-distance markets.¹¹¹ In high-speed Internet markets, cable – not telephone – is the dominant player. AT&T, in particular, has substantial holdings on both sides of the line – and thus an enormous incentive (under this theory) to use its dominance in local high-speed markets to gain an unfair competitive edge in backbone markets. To be sure, forcing a separation of local high-speed markets from long-distance markets might entail some

¹¹⁰ See Comments of SBC Communications Inc., CC Docket No. 96-149 (FCC filed Nov. 29, 2000); Comments of BellSouth Corporation, CC Docket No. 96-149 (FCC filed Nov. 29, 2000).

¹¹¹ See, e.g., Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, 20745-46, ¶ 386 (1997).

increase in costs, and reduction in network functionality. But if such a trade-off is appropriate in the case of nondominant ILECs, it is certainly necessary and appropriate for the dominant cable provider.

Resale Obligations. Section 251(c)(4)'s mandatory discount obligations promote "expeditious and efficient" market entry, according to the FCC, because they allow non-facilities-based competitors to provide competing services through resale.¹¹² The Commission has applied the Act's resale obligations to ILECs' advanced services.¹¹³ Implicit in this holding is the conclusion that facilities-based competition in the last mile for broadband is not sufficiently developed to enable competition without allowing access (at wholesale rates) to the incumbents' advanced services networks.¹¹⁴ If so, then it is even more imperative that competitors have access to cable broadband networks that are more ubiquitous than DSL networks. And cable operators, with close to 75 percent market share, are far more capable of exercising market power to exact unreasonable resale prices from competitors, than are ILECs, with barely a third as much of the market.

Universal Service. Section 254(d) requires universal service contributions from "[e]very telecommunications carrier that provides interstate telecommunications."¹¹⁵ As telecommunications carriers providing telecommunications services, cable operators, no less than ILECs, should be subject to universal service contribution obligations.¹¹⁶

¹¹² *Local Competition Order*, 11 FCC Rcd at 15954, ¶ 907; see also *id.* at 15516-17, ¶ 32, 15935-36, ¶¶ 874-875, 15938-39, ¶ 881.

¹¹³ *Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24040, ¶¶ 60-61.

¹¹⁴ See *Local Competition Order*, 11 FCC Rcd at 15981, ¶ 976 ("Nonincumbent LECs definitionally lack the market power possessed by incumbent LECs and were therefore not made subject to the wholesale pricing obligation in the 1996 Act.") (footnote omitted).

¹¹⁵ 47 U.S.C. § 254(d).

¹¹⁶ See United States Telecom Association Petition for Declaratory Ruling at 4-10, CC Docket No. 96-45 (FCC filed Sept. 26, 2000).

Advanced Services Affiliates. Finally, in recent ILEC mergers, the Commission exacted the “voluntary” condition of a separate advanced services affiliate because it would “level [the] playing field between [the ILEC] and its advanced services competitors,” and “greatly accelerate competition in the advanced services market by lowering the costs and risks of entry and reducing uncertainty, while prodding all carriers, including [the ILECs] to hasten deployment.”¹¹⁷ The same economic logic should require cable – with almost three-quarters of the broadband access market, and tentacles into upstream and downstream markets – to place their advanced services in separate affiliates.

In sum, the procompetitive justifications cited by the Commission in imposing spectrum unbundling, collocation requirements, interLATA restrictions, resale, and separate affiliate obligations on ILECs – that have barely a quarter of the broadband market – require that cable be subject to the same regulatory burdens.

3. Intermediate Title II Regulation: Nondominant Carrier Regulation, the Elimination of UNEs, and Forbearance.

As with the Title I model, the Commission can opt for a middle-ground of less burdensome regulation under Title II. The mere fact that cable modem service and DSL are classified as “telecommunications services” does not mean that the full panoply of restrictions and obligations currently applicable to DSL should be continued (and, hence, extended to cable). Rather, for the same reasons it makes sense to classify all such services as information services subject to Title I – that the services are competitive and

¹¹⁷ *SBC/Ameritech Order*, 14 FCC Rcd at 14859-60, ¶ 363; *Bell Atlantic/GTE Order* ¶ 261. As previously noted, *see supra* p. 23, the Commission has also hinted that the same requirement may be extended to other carriers through the 271 process.

that there is no underlying bottleneck – it makes sense, even if the underlying transport is a Title II service, to establish a framework that relies primarily on market forces rather than regulatory fiat to promote the public interest.

As part of such a framework, the Commission could declare all broadband Internet providers to be nondominant carriers, subject to minimal tariff and notice requirements under sections 203 and 214. The Commission devised its dominant/nondominant regulatory regime for rate and entry regulation in the 1980s, when it established a “permissive detariffing policy” for nondominant interexchange carriers.¹¹⁸ The Commission did so in an effort to “pursue[] pro-competitive and deregulatory goals similar to those underlying the 1996 Act.”¹¹⁹ The Commission concluded that “market forces, together with the Section 208 complaint process” (and the authority to re-impose tariff-like requirements) were sufficient “to protect the public interest.”¹²⁰

Cable providers, although dominant in the broadband market today, lack the type of market power that the Commission has regarded as precluding nondominant carrier status.¹²¹ Given the nascent nature of the industry, and the fact that competitors – DSL, terrestrial and satellite wireless providers – are fast rolling out alternative services, cable

¹¹⁸ See Order, *Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, 11 FCC Rcd 17963, 17968-70, ¶¶ 19-22 (1996) (describing *Competitive Carrier* cases).

¹¹⁹ Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, 11 FCC Rcd 20730, 20735, ¶ 8 (1996) (“*Interexchange Order*”).

¹²⁰ *Id.* at 20736, ¶ 9. The Commission has extended its nondominant carrier regime to a host of common carriers, including domestic satellite carriers and carriers providing digital transmission services. Fifth Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 98 F.C.C.2d 1191, 1200-02, ¶¶ 12-13, 1205-09, ¶¶ 19-26 (1984).

¹²¹ See First Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 F.C.C.2d 1, 21, ¶¶ 57-58 (defining dominant carrier as one that “possesses market power” and noting that control of bottleneck facilities was “prima facie evidence of market power”).

does not possess the “control over bottleneck facilities” or ability to sustain unjust and unreasonable prices to warrant dominant carrier regulation.¹²²

Of course, if the Commission concludes that cable qualifies for nondominant carrier treatment, ILECs, with perhaps one-third of cable’s market share, must be nondominant too. Thus, under Title II’s nondominant carrier regulation, *all* broadband providers would be subjected to reduced regulation in the form of streamlined tariff, facilities-authorization and notice requirements.¹²³

In addition to treating all broadband providers as nondominant, the Commission could remove many of the current restrictions on ILEC provision of broadband Internet access, thus making it unnecessary to extend such restrictions to cable operators under Title II. For example, as already discussed in the Title I context, the Commission could (and certainly should) remove the high frequency portion of the loop from its list of UNEs that must be provided by incumbent LECs. As discussed above, *see supra* p. 21, the Commission is required to de-UNE-fy elements insofar as competition would not be “impaired” by their disappearance. And with the elimination of mandatory line sharing, loop conditioning, loop qualification, and related collocation mandates would also fall by the wayside, as well as separate affiliate conditions imposed through the merger process. In that case – but only in that case – such restrictions would not need to be extended to cable modem providers, even under a Title II regime. The key principle driving all such

¹²² *Interexchange Order*, 11 FCC Rcd at 20736, ¶ 9 (“The Commission also noted that firms lacking market power could not charge unlawful rates because customers could always turn to competitors.”).

¹²³ The effects of declaring carriers nondominant include: (1) they can file tariffs for new services on one day’s notice and tariffs will be presumed lawful; (2) several section 214 requirements are either reduced or eliminated; (3) requests to discontinue or reduce service will be deemed granted after 31 days unless a party or the Commission objects; (4) reduced annual reporting requirements. *See Order, Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3281, ¶ 12 (1995) (“*AT&T Nondominance Order*”).

Commission decisions must be regulatory parity if the Commission is to establish a competitive market structure.

Finally, under section 10, the FCC must forbear from regulations that are (1) unnecessary to ensure just and reasonable practices and (2) unnecessary for the protection of consumers, as long as (3) such forbearance is consistent with the public interest.¹²⁴ Forbearance is in the public interest if it “promote[s] competitive market conditions” and “enhance[s] competition among providers of telecommunications services.”¹²⁵ To make this last determination, the Commission asks whether sufficient competition has emerged in the relevant market to prevent the carrier from exercising market power.¹²⁶

If sufficient competition has emerged so as to prevent cable, the competitor with almost 75 percent market share, from exercising market power, it is inconceivable that any other competitor in that market can exercise market power. Whether the Commission concludes that requiring interconnection will enhance competition among broadband providers, or that the public interest is served by leaving the choice in the hands of the provider, the Commission cannot selectively forbear given cable’s dominance. As the FCC has itself recognized, asymmetrical regulation in competitive

¹²⁴ 47 U.S.C. § 160(a). Section 706 of the 1996 Act also authorizes the Commission to forbear from applying regulation to broadband providers. *See id.* § 157 note. But the FCC has ruled that section 706(a) does not constitute an independent grant of forbearance authority, *see Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24044, ¶ 69; accordingly, the forbearance analysis included herein applies equally to the exercise of the FCC’s power under section 706.

¹²⁵ 47 U.S.C. § 160(b).

¹²⁶ *See* First Report and Order, *In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, WT Docket No. 98-100, FCC 00-311, ¶ 13 (rel. Sept. 8, 2000) (Commission’s forbearance policy is “to deregulate wherever the operation of competitive market forces is capable of rendering regulation unnecessary”).

markets is certainly *not* in the public interest because it hinders the competitive process.¹²⁷

Accordingly, even if the FCC concludes that it should exercise its forbearance power to relieve dominant cable operators – in their capacity as telecommunications carriers – of spectrum unbundling, collocation, resale, separate affiliate obligations and the interLATA restriction, it may do so only to the extent that it can also forbear from applying the same regulations to incumbent telephone companies. The Commission may conclude that the requirements of sections 251(c) and 271 have been “fully implemented” with respect to broadband services – because no bottleneck exists with respect to such services. But to the extent that such requirements continue to be imposed on ILEC provision of broadband Internet services, they must also be imposed on the provision of those same services by cable companies.

C. CABLE MODEM SERVICE IS NOT A “CABLE SERVICE.”

The final alternative regulatory classification for cable modem services, as a “cable service” under Title VI, is no alternative at all. As an initial matter, section 602 defines “cable service” as the “transmission to subscribers” of video or other programming services.¹²⁸ The Commission has long defined “subscriber” in this context to mean “a member of the general public who receives broadcast programming distributed by a cable television system.”¹²⁹ Since cable modem service is provided

¹²⁷ See *AT&T Nondominance Order*, 11 FCC Rcd at 3290-91, ¶ 32 (lifting tariff notice requirements imposed on AT&T in the long distance market because “AT&T would [otherwise] be subject to excessive regulatory costs and would be hindered in its ability to respond to moves by its competitors”).

¹²⁸ 47 U.S.C. § 522(6).

¹²⁹ 47 C.F.R. § 76.5(ee).

separate and apart from any receipt of broadcast programming, it is not necessarily offered to “subscribers” and therefore cannot fit within the definition of a cable service.

Beyond this, to qualify as a “cable service,” Internet access would have to involve “other programming service” – *i.e.*, “information that a cable operator makes available to all subscribers generally.”¹³⁰ But Internet access involves numerous services that are specifically designed *not* to be “available to all subscribers generally.” Email accounts, for example, are typically available to individual users only. Chat-room conversations are likewise designed to wall-off communications from “all subscribers generally.”

The legislative history confirms that Internet access does not qualify as “other programming service.” The history accompanying the 1984 Act – which included “other programming service” within the term “cable service” – unmistakably carves out information services (and, therefore, Internet access, *see supra* pp. 14-15) from that term.¹³¹ The 1996 Act amended the definition to add the phrase “or use” to the “subscriber interaction” included within the definition of “cable service,” but that amendment had no bearing on the relevant phrase “other programming service.”¹³² As

¹³⁰ 47 U.S.C. § 522(14). “Cable service” is defined in full as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” *Id.* § 522(6). Internet access is clearly not “video programming,” which is defined as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.” *Id.* § 522(2).

¹³¹ See H.R. Rep. No. 98-934, at 42-44 (“services providing subscribers with the capacity to engage in transactions or to *store, transform, forward, manipulate, or otherwise process* information or data would not be cable services”) (emphasis added); 47 U.S.C. § 153(20) (defining “information service” to include “the offering of a capability for . . . *storing, transforming, [or] processing* . . . information”) (emphasis added); see also H.R. Rep. No. 98-934, at 44 (“Some examples of *non-cable services* would be: shop-at-home and bank-at-home services, electronic mail, one-way and two-way transmission on [sic] non-video data and information not offered to all subscribers . . .”).

¹³² See, e.g., 142 Cong. Rec. H1122 (daily ed. Jan. 31, 1996) (statement of Rep. Bliley) (the term “or use” was added to “reflect[] the evolution of video programming toward interactive services”). Nor did the 1996 Act alter the “one-way” limitation in the definition, and Internet access services are clearly two-way services.

the Eleventh Circuit explained, Congress altered the definition of “cable service” merely “to include services that cable television companies offer to their customers to allow them to interact with traditional video programming.”¹³³

If Internet access provided over cable qualifies as a “cable service,” moreover, so too would the exact same service provided by satellite, fixed wireless, DSL, or even over a dial-up connection. All such services would then be removed from Title II regulation and cast into the quagmire of local franchising requirements. That would obviously be a policy disaster and a regulatory nightmare for the Commission.

¹³³ *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1276-77 (11th Cir. 2000) (“we will not read [the addition of ‘or use’] to effectuate a major statutory shift . . .”).

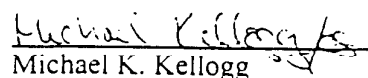
CONCLUSION

The Commission has repeatedly expressed a preference for market-based regulation of high-speed Internet services. Absent meaningful regulatory relief for all providers of such services, that preference is an empty platitude.

Respectfully submitted,

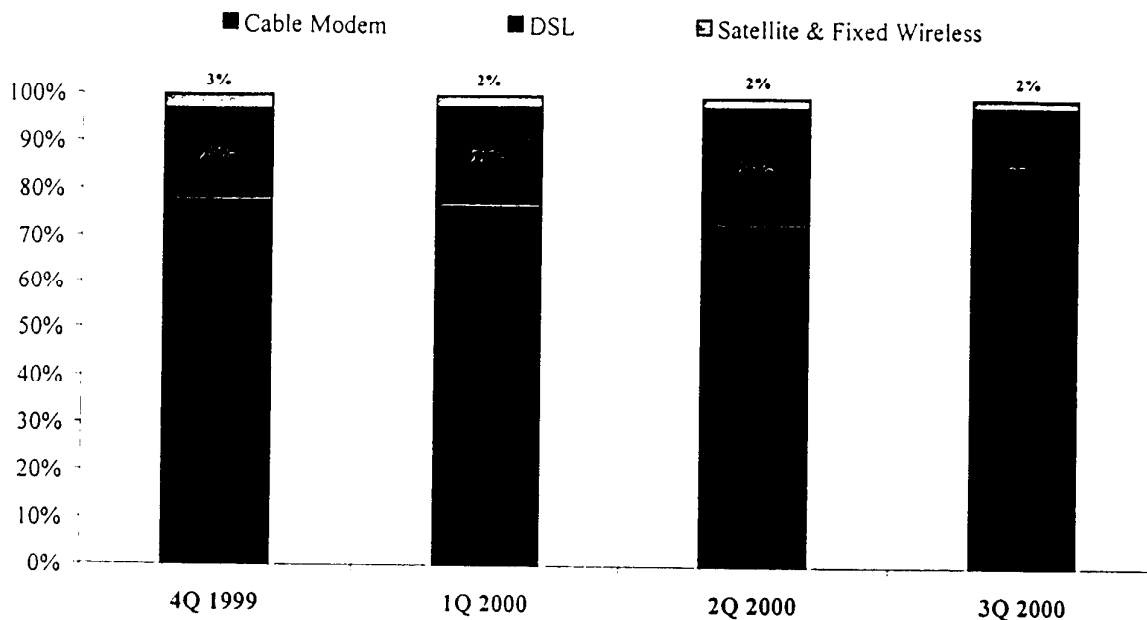
Lori Fink
Paul K. Mancini
Roger K. Toppins
SBC COMMUNICATIONS INC.
1401 I Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 326-8895
Counsel for SBC Communications Inc.

Richard M. Sbaratta
Theodore R. Kingsley
BELLSOUTH CORPORATION
4300 BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375
(404) 249-2608
Counsel for BellSouth Corporation


Michael K. Kellogg
Antonia M. Apps
Colin S. Stretch
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
*Counsel for SBC Communications Inc.
and BellSouth Corporation*

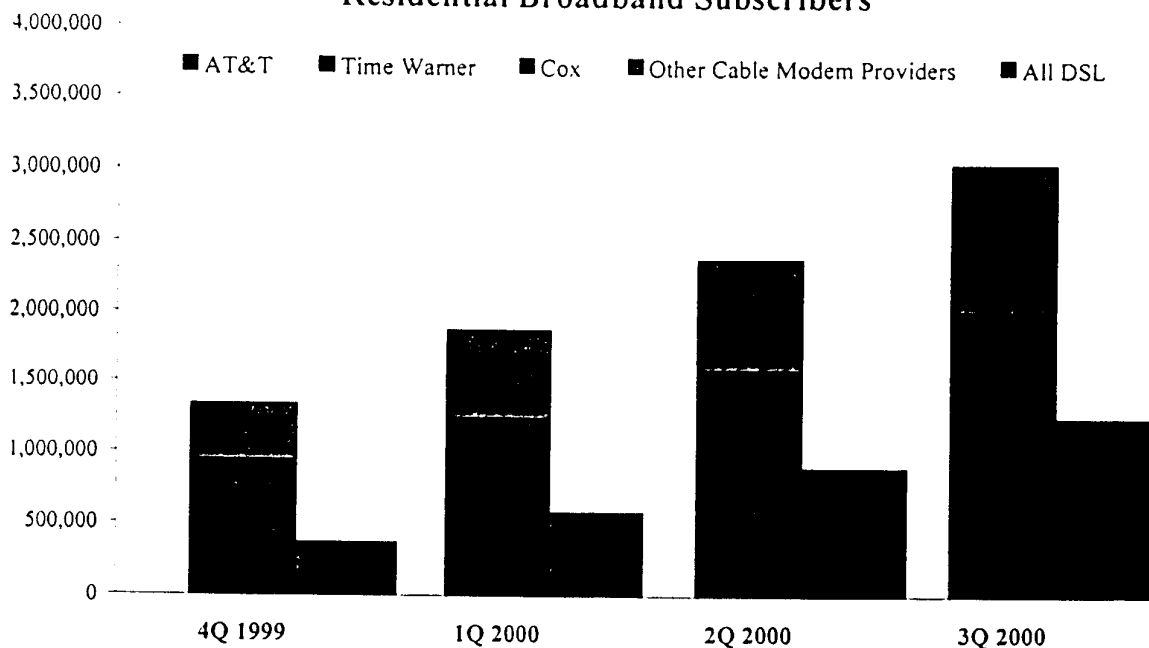
ATTACHMENT A

Residential Broadband Market Division



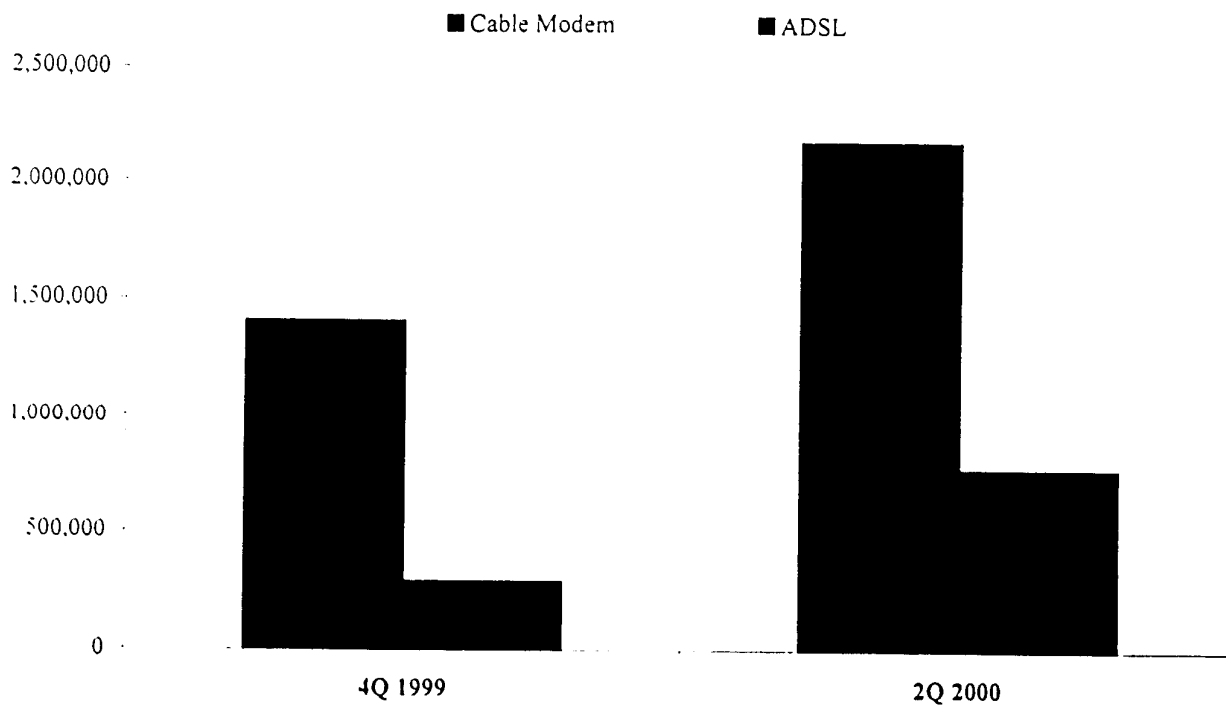
Sources: Cable Datacom News, *Cable Modem Market Stats & Projections*, <http://www.cabledatacomnews.com/cm/cmic16.html> (4Q 1999; 1Q 2000; 2Q 2000; 3Q 2000); xDSL.com, *TeleChoice DSL Deployment Summary*, http://www.xdsl.com/content/resources/deployment_info.asp (4Q 1999; 1Q 2000; 2Q 2000; 3Q 2000); FCC, *High-Speed Services for Internet Access: Subscriberhip as of June 30, 2000* (rel. Oct. 2000).

Residential Broadband Subscribers



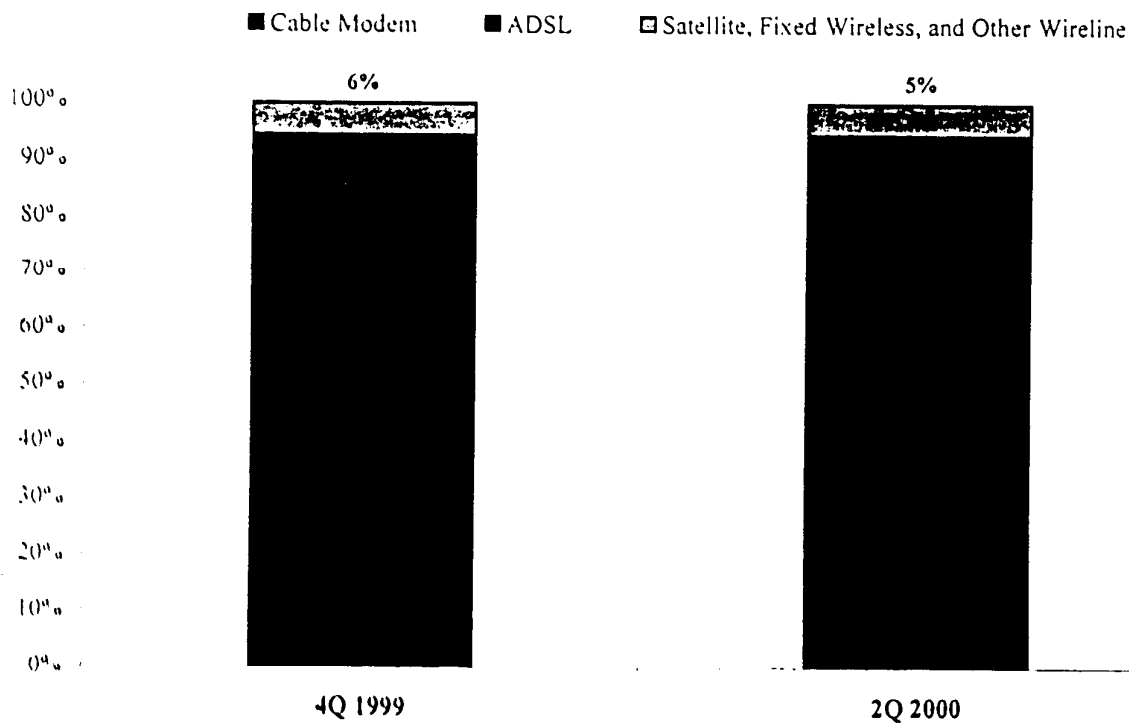
Sources: Cable Datacom News, *Cable Modem Market Stats & Projections*, <http://www.cabledatacomnews.com/cm/cmic16.html> (4Q 1999; 1Q 2000; 2Q 2000; 3Q 2000); xDSL.com, *TeleChoice DSL Deployment Summary* http://www.xdsl.com/content/resources/deployment_info.asp (4Q 1999; 1Q 2000; 2Q 2000; 3Q 2000); FCC, *High-Speed Services for Internet Access: Subscriberhip as of June 30, 2000* (rel. Oct. 2000).

Residential & Small Business High-Speed Subscribers



Source: FCC, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000* (rel. Oct. 2000).

Residential & Small Business High-Speed Market Division



Source: FCC, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000* (rel. Oct. 2000).

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 2000, I caused copies of the foregoing *Comments of SBC Communications Inc. and BellSouth Corporation* to be served by hand delivery upon the following parties:

Johanna Mikes
Common Carrier Bureau
445 12th Street, S.W.
Room 5-C163
Washington, D.C. 20554

Christopher Libertelli
Common Carrier Bureau
445 12th Street, S.W.
Room 5-C264
Washington, D.C. 20554

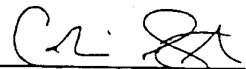
Carl Kandutsch
Cable Services Bureau
445 12th Street, S.W.
Room 3-A832
Washington, D.C. 20554

Janice Myles
Common Carrier Bureau
445 12th Street, S.W.
Room 5-C327
Washington, D.C. 20554

Douglas Sicker
Office of Engineering & Technology
445 12th Street, S.W.
Room 7-A325
Washington, D.C. 20554

Robert Cannon
Office of Plans & Policy
445 12th Street, S.W.
Room 7-B410
Washington, D.C. 20554

International Transcription Service, Inc.
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554



Colin S. Stretch

CERTIFICATE OF SERVICE

I do hereby certify that I have this 24th day of September 2001 served the parties of record to this action with a copy of the foregoing **COMMENTS OF BELLSOUTH CORPORATION** by electronic filing, addressed to the parties listed below:

Magalia Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S. W.
Room TW-B204
Washington, DC 20554

Qualex International
Portals II
445 12th Street, SW
Room CY-B402
Washington, DC 20554

/s/ Lynn Barclay
Lynn Barclay